92-744

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under this Court's decisions in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), a court of appeals must exercise independent, *de novo* review of the Federal Trade Commission's finding that commercial speech is misleading and therefore unprotected by the First Amendment.

2. Whether the FTC may rely solely on its own reading of an advertisement in determining that an ad that is true on its face nonetheless conveys an implied misrepresentation to members of the public, or instead must base its determination on reliable extrinsic evidence of the public's understanding of the ad.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Kraft, Inc., states that its parent corporation is Kraft General Foods, Inc. The parent corporation of Kraft General Foods, Inc., is Philip Morris Companies, Inc. Kraft, Inc., has no subsidiaries (other than wholly owned subsidiaries).

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PETITION FOR A WRIT OF CERTIORARI

Kraft, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 970 F.2d 311. The opinion of the Federal Trade Commission (FTC) (App., *infra*, 29a-78a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1992. App., *infra*, 79a-80a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech." Sections 5, 12, and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52, and 55) and Section 43(a) of the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) are reprinted at pages 81a-87a of the Appendix to this petition.

STATEMENT

This case involves the Federal Trade Commission's decision that petitioner Kraft, Inc., violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52, by misrepresenting the amount of calcium in Kraft Singles American Pasteurized Process Cheese Food relative to the calcium content of five ounces of milk and of imitation cheese slices.[1] The FTC found that two sets of Kraft's advertisements for Singles -- the so-called "Skimp" and "Class Picture" ads -- falsely implied that each slice of Singles contains as much calcium as five ounces of milk. The Commission also found that the Skimp ads conveyed the false implication that each slice of Singles contains more calcium than a slice of imitation cheese.

The Commission based these findings on its own reading of the advertisements, without relying on any objective, extrinsic evidence of how consumers actually interpreted the ads. Accordingly, the FTC ordered Kraft to cease and desist from misrepresenting the amount of calcium or any other nutrient contained in any of its cheese, imitation cheese, or substitute cheese products. The Seventh Circuit, reviewing the FTC's decision under the deferential "substantial evidence" test, enforced the cease and desist order.

1. Kraft Singles and Imitation Cheese Slices

Kraft, Inc., produces and markets Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles"), which are individually wrapped slices of pasteurized process cheese food. App., *infra*, 33a. The Food and Drug Administration requires that pasteurized process cheese food contain at least 51% natural cheese. *Id.* at 34a n.2. Each slice of Singles contains about 68% natural cheese. *Ibid.* By contrast, imitation cheese slices contain little or no cheese but normally consist of water, vegetable oil, flavoring

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[1] Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). Section 12 prohibits "false advertis[ing]." *Id.* § 52(a). Section 15 defines false advertising as advertising that is "misleading in a material respect." *Id.* § 55(a) (1). If an advertisement violates Section 12, it also violates Section 5. *Id.* § 52(b). See App., *infra*, 81a-86a.

agents, and fortifying ingredients. *Ibid.* Imitation slices are, by FDA definition, "nutritionally inferior" to pasteurized process cheese food slices. *Ibid.* Substitute cheese slices do not contain enough natural cheese to qualify as pasteurized process cheese slices, but are not nutritionally inferior to those slices. *Ibid.*[2]

In the early 1980s, makers of imitation slices began advertising their products as more nutritious and less expensive than dairy slices such as Singles. App., *infra*, 34a. Kraft responded by attempting, through its own ads, to inform consumers that Singles contain more milk than imitation slices. *Id.* at 33a-35a. The general theme of these ads was that each slice of Singles is made from five ounces of milk, whereas imitation slices use very little milk, but consist mostly of vegetable oil and water. *Id.* at 34a. Kraft sought to educate consumers that Singles cost more than imitation slices because Singles' ingredients are more expensive; it believed that consumers would be willing to pay a small premium to get a real dairy product. *Id.* at 34a-35a.

2. The Kraft Advertisements

As part of this advertising campaign, Kraft developed the two sets of ads at issue in this case, referred to collectively as the "Skimp" ads and the "Class Picture" ads. App., *infra*, 33a. The Skimp ads directly compared Singles to imitation slices on the basis of milk content. *Id.* at 35a. Those ads also referred to calcium as an example of the nutrients in Singles. *Ibid.* Kraft focused on calcium because consumer interest in it was increasing and because other products were being touted as good sources of calcium. *Ibid.*

The set of advertisements known as the Skimp ads actually consisted of many different ads, and each of the Skimp ads had several variations. The only ad the FTC discussed was the Skimp/Blue Eyes television commercial, which contained the following audio copy:

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy

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[2] Consistent with the FTC's and Seventh Circuit's usage, see App., *infra*, 2a, 34a n.2, we will refer to both imitation and substitute slices as "imitation slices" for purposes of this petition.

> KRAFT Singles. Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big KRAFT means. Good thing I do.
>
> *Singers*: KRAFT Singles. More milk makes 'em . . . more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

App., *infra*, 42a.

The visual image corresponding to the statement "Imitation slices use hardly any milk" showed a small amount of milk being poured into a glass. App., *infra*, 42a. As the voice-over said, "But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow," the glass continued to fill, up to a five ounce mark. *Ibid*. The commercial also showed milk pouring into a glass that gradually became part of a package of Singles, which bore the phrase "5 oz. milk slice" inside the image of a glass on the label. *Ibid*.

The Class Picture advertisements did not mention imitation slices, but emphasized Singles' milk content and promoted Singles as a good source of calcium (a fact not disputed by the Commission). App., *infra*, 35a. The ad on which the FTC focused, the Class Picture/5 ounce television commercial, depicted a group of school children having their class picture taken, and contained the following audio copy:

> *Announcer (voice over)*: Can you see what's missing in this picture? Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.
>
> *Photographer*: Say Cheese!
>
> *Kids*: Cheese!
>
> *Announcer (voice over)*: Say KRAFT Singles.

Id. at 49a. The Class Picture ads also contained a superscript stating that "[o]ne 3/4 ounce slice has 70% of the calcium of five ounces of milk." *Ibid.*

3. Kraft's Testing and Modifications of the Advertisements

Before disseminating the Skimp and Class Picture ads, Kraft had some of them "copy-tested" to determine what messages consumers would take from them and to measure consumer recall. Two consumer survey organizations, ASI Market Research (ASI) -- "the leading supplier of copy testing services in the nation" (ALJ op. 17) -- and Communication Workshop Inc. (CWI), tested the Class Picture/5 ounce commercial, and ASI tested the Skimp/Brown Eyes commercial (which was essentially the same as the Skimp/Blue Eyes commercial). *Id.* at 17-19. ASI and CWI used unaided open-ended questions to discover the messages consumers took away from the ads; such questions are standard practice in the advertising field. *Id.* at 17-19, 38. Officials from Kraft and Kraft's advertising agency reviewed the results of these tests and determined that consumers did not take away any false messages from the ads. *Id.* at 18-19.

Despite the results of Kraft's pre-dissemination testing, Kraft received a complaint from the Center for Science in the Public Interest (CSPI) claiming that the Skimp ads conveyed the message that a slice of Singles contains as much calcium and other nutrients as five ounces of milk. ALJ op. 19. That message, if actually conveyed by the ads, would be false because some of the nutrients of the five ounces of milk that go into each 3/4 ounce slice of Singles are lost during processing.

In response to the CSPI complaint, Kraft reexamined the results of its copy-testing and determined that the Skimp ads did not convey such a claim. ALJ op. 18. Nevertheless, Kraft decided to modify the Skimp ads by changing the clause "KRAFT *has* five ounces per slice" to "Kraft *is made from* five ounces per slice." App., *infra*, 4a. Kraft later made two additional changes. First, it changed the clause "so her little bones get calcium" to "plus her little bones get calcium." Tr. 1552-1553. Second, it added a superscript stating that "one 3/4 ounce slice has 70% of the calcium of five oz. of milk." App., *infra*, 4a.

Notwithstanding Kraft's efforts to ensure that the Skimp ads were not misleading, CSPI filed a complaint about the ads with the FTC. In January 1986, the FTC undertook an investigation of whether the Skimp ads conveyed misleading claims. ALJ op. 20.

Kraft then hired a third research organization, Opinion Research Corp. (ORC), to conduct yet another survey to determine whether the complaints about the Skimp ads had any merit. ALJ op. 40. The ORC survey was purposely designed to "obtain[] responses supporting the implications raised by [the FTC]" by specifically asking survey respondents whether the ads made any comparisons to other products. *Id.* at 41. Despite such questions, the ORC survey showed that an average of only 3% of survey respondents took away the implication that Singles contain as much calcium as five ounces of milk, and an average of only 6.3% took away the message that Singles contain more calcium than imitation slices. *Id.* at 42. The insignificant percentage of respondents that perceived the alleged claims buttressed Kraft's determination that the ads were not implicitly misleading. See *id.* at 71. Cf. App., *infra*, 41a (practice is deceptive if it misleads a "significant minority" of reasonable consumers); *Henri's Food Prods. Co.* v. *Kraft, Inc.*, 717 F.2d 352, 358-359 (7th Cir. 1983) (under Lanham Trade-Mark Act, survey showing that only 7.6% of respondents thought defendant's product was made by plaintiff supported finding of *no* likelihood of confusion).

Nevertheless, on June 17, 1987, the FTC, having broadened its investigation to include the Class Picture ads, issued a complaint charging that both sets of ads conveyed the misleading claims that (1) each slice of Singles contains as much calcium as five ounces of milk (the "milk equivalency" claim), and (2) each slice of Singles contains more calcium than an imitation slice (the "imitation superiority" claim). ALJ op. 1.

4. The FTC Proceedings

An administrative law judge found that both sets of ads conveyed both alleged claims. ALJ op. 62-70. First, the ALJ found that the language and visual elements of the Skimp/Brown Eyes television commercial "and [of] ads containing the same elements" were "likely to give reasonable consumers the net

impression of milk equivalency and imitation superiority." *Id.* at 64.

Second, the ALJ found that the alleged claims were false because a 3/4 ounce slice of Singles contains approximately 70% of the calcium of five ounces of milk, ALJ op. 48-49, and because most imitation slices have as much calcium as Singles. *Id.* at 51-52. He therefore ordered Kraft to cease and desist from making these claims about any of its individually wrapped slices of cheese or imitation cheese. *Id.* at 73-75.

The FTC affirmed the ALJ's finding of liability in significant part. App., *infra*, 29a, 37a, 70a. The Commission found that the Skimp ads conveyed both the milk equivalency and imitation superiority claims based on its own reading of the ads. *Id.* at 43a-46a, 51a. Referring to the Skimp/Blue Eyes television commercial, the Commission noted four elements that contributed to its finding that the ads conveyed the milk equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces per slice"; (2) "repetition of the precise amount of milk in a Kraft Single"; (3) the use of the word "so" to link the reference to milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to a five ounce mark, and the super-imposition of that image onto a package of Singles. *Id.* at 43a-44a.[3]

Two other elements led the Commission to find that the Skimp ads also conveyed the imitation superiority claim: (1) the "express reference to imitation slices" combined with "the use of comparative language ('hardly any,' 'but')"; and (2) "the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio portion refers to Kraft Singles." *Id.* at 51a.

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[3] The Commission also found that Kraft's modifications of the ads did not dispel the net impression of milk equivalency, although it discussed only the addition to the television commercial of the superscript stating that each slice of Singles contains 70% of the calcium of five ounces of milk. App., *infra*, 44a. The FTC stated that the superscript in the television commercial was ineffective because it appeared only briefly and amidst distracting audio and visual elements. *Ibid.*

Because it concluded that its own reading of the advertisements demonstrated the existence of both claims, the Commission found it "unnecessary * * * to resort to extrinsic evidence." App., *infra*, 45a. See also *id.* at 47a, 51a. The Commission merely noted that the "weight of the probative extrinsic evidence" was "consistent" with its determination as to both claims. *Ibid.*

The Commission then found that the Class Picture ads contained "copy elements substantially similar to the 'Skimp' ad elements that convey the impression of milk equivalence." *Id.* at 49a. The only such element that it mentioned, though, was the juxtaposition of the reference to five ounces of milk with the statement "so they're concentrated with calcium." *Ibid.* The Commission once more relied solely on its own reading of the ads in reaching its conclusion, but again noted in passing that the weight of the probative extrinsic evidence was consistent with its view. *Id.* at 50a & n.14.

The Commission held, however, that the Class Picture ads did not convey the imitation superiority claim because they did not expressly compare Singles to imitation slices or contain any visual cues that prompt a comparison. App., *infra*, 53a. It also found that the extrinsic evidence was insufficient to support a finding that the ads made the imitation superiority claim. *Id.* at 54a-55a.

Finally, the FTC greatly expanded the coverage of the ALJ's cease and desist order to include not just individually wrapped cheese and imitation cheese slices, but also *any* cheese or imitation cheese product. App., *infra*, 29a-30a, 65a.

5. The Court of Appeals' Decision

The Seventh Circuit (which had jurisdiction under 15 U.S.C. § 45(c) and (d)) enforced the FTC's cease and desist order. At the outset, the court held that it would review the FTC's findings that the ads were misleading under the "highly deferential, substantial evidence test." App., *infra*, 7a-9a. The court rejected Kraft's argument that this Court's decisions in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), required independent, *de novo* review of the Commission's findings because

those findings determined whether the ads were protected by the First Amendment. *Ibid.*

The court of appeals' decision on the standard of review rested on two grounds. First, the court held that *de novo* review is not applicable in commercial speech cases. Although acknowledging that this Court in *Peel* had applied *de novo* review to a restriction on commercial speech, the Seventh Circuit determined that this Court had not intended that courts should exercise *de novo* review in all commercial speech cases. App., *infra*, 8a. Second, the court of appeals distinguished *Bose* and *Peel* as involving review of *court* decisions and stated that the Commission is entitled to greater deference than courts because of its "expertise in the field of deceptive advertising." *Ibid.*

In addition, the court of appeals distinguished *Peel* as involving a "prophylactic regulation * * * completely prohibiting an entire category of potentially misleading commercial speech," whereas this case concerned "an individualized * * * cease and desist order, prohibiting a particular set of deceptive ads." App., *infra*, 9a. The court held that this distinction "justif[ied] differing levels of appellate review." *Ibid.*

On the merits, the Seventh Circuit held that it was permissible for the FTC to rely solely on its own reading of the advertisements to find that the ads, though truthful on their face, conveyed the misleading implications. App., *infra*, 13a. The court stated, however, that its "holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception." *Id.* at 16a. Nevertheless, the court felt constrained by precedent to uphold the FTC's practice of relying on its own reading of an ad in determining whether the ad is implicitly misleading.

In a concurring opinion, Judge Manion expressed his concern over the chilling effect the FTC's practice has on protected, nonmisleading commercial speech:

> [T]he FTC's current procedure threatens to chill nonmisleading, protected [commercial] speech. Although not all commercial speech has constitutional protection, the law

> has developed [to protect nonmisleading commercial speech] since this court decided that the FTC could rely on its own interpretation of ads[.] The Supreme Court has recognized that a free flow of information is indispensable to decision-making in the free enterprise system. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). But the FTC jeopardizes this flow by relying on the FTC commissioners' subjective interpretation to determine whether an ad, while literally true, implies a false message. Advertisers will be unable to predict whether the FTC will find particular ads misleading. Pre-dissemination surveys showing consumers *are not* misled will be useless since the FTC is free to ignore any such extrinsic evidence and rely on its subjective judgment that consumers *may* be misled. Advertisers unwilling to gamble with a multi-million dollar ad campaign have essentially two choices: (1) submit every campaign to the FTC in advance or (2) disseminate ads that say little or nothing about a product or service. An advertiser will not want to risk producing comparative ads which the FTC may ultimately find to imply false, unintended messages.

App., *infra*, 27a-28a. Nevertheless, Judge Manion agreed with the court that precedent foreclosed any challenge to the FTC's reliance on its own reading of an ad. *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

Under the approach approved by the court of appeals, the Federal Trade Commission may determine that an advertisement that is true on its face is nevertheless *implicitly* misleading based solely on the individual commissioners' reactions to the ad, without any need for reliable, objective evidence to support that reading. The commissioners' subjective interpretation is then given only the most perfunctory, deferential judicial review. The net effect of the Seventh Circuit's decision is to invest the FTC with virtually unchecked power to restrict speech on the basis of the commissioners' own subjective judgments.

The decision below warrants this Court's review for several reasons. First, the Seventh Circuit's decision on the applicable standard of review conflicts with the decisions of this Court and of several other circuits. Moreover, this issue is likely to recur with

great frequency, not only in FTC cases involving false advertising, but in all commercial speech cases and cases involving agency decisions restricting speech.

Second, the Commission's approach to interpreting advertisements under the FTC Act conflicts with the established procedure under the Lanham Act's virtually identical prohibition against false advertising, in which courts require objective evidence that a facially truthful ad is implicitly misleading. The FTC's approach also will have a substantial chilling effect on truthful, informative advertisements. This case therefore is of enormous importance to businesses that depend on advertisements to promote their products and services, as well as to consumers who rely on such advertisements in choosing among options in the marketplace.

Finally, the Seventh Circuit acknowledged these concerns but felt compelled by decisions of this Court to enforce the FTC's order. Only this Court can correct the court of appeals' misunderstanding of those decisions.

I. COURTS SHOULD APPLY *DE NOVO* REVIEW TO FTC DECISIONS HOLDING THAT COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

The first issue on which certiorari should be granted concerns the standard of review applicable to the FTC's decision that Kraft's advertisements conveyed misleading implications and therefore were unprotected by the First Amendment. That issue comprises two subsidiary questions: (1) whether the standard of independent, *de novo* review announced in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), is applicable to commercial speech cases; and (2) whether the *Bose* standard applies to judicial review of agency decisions that particular speech is unprotected.

The courts of appeals have reached conflicting conclusions on both of these questions. Both questions, moreover, are important and are likely to recur with great frequency. Accordingly, one distinguished commentator has observed that both of these questions require resolution by this Court. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 244 (1985) ("Sooner or later, the Supreme Court must confront a range of issues for which its *Bose* opinion provides little guidance. Quite obviously, the Court must

determine whether *Bose*'s independent judgment requirement applies to all first amendment claims, and it must also assess the significance of its reasoning for administrative agencies.").

Furthermore, the conflict in the circuits on these questions is sure to promote forum shopping in cases involving review of FTC false advertising decisions. Because such decisions are reviewable in any circuit in which the false advertising is alleged to occur or in which the advertiser resides or does business (see 15 U.S.C. § 45(c)), most FTC decisions may be appealed to any one of a large number of circuits. The prospect of such forum shopping emphasizes the need for certiorari.

A. *Bose* Applies to Commercial Speech Cases

In *Bose Corp.* v. *Consumers Union*, *supra*, this Court held that appellate courts have a constitutional responsibility to engage in nondeferential, "independent review" of the record in free speech cases to determine whether or not particular speech is protected by the First Amendment. 466 U.S. at 510-511. The specific issue in *Bose* was whether a defamatory statement about a "public figure" was made with actual malice, and was therefore unprotected. But the Court's discussion strongly suggested that independent appellate review is necessary *whenever* particular speech is alleged to fall within an "unprotected category" -- categories including not only defamation, but also "fighting words," incitement to riot, obscenity, child pornography, *and* false or misleading commercial speech. *Id.* at 504-511 & n.22. In such cases, independent review is required "both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.[4]

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[4] See also *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) ("the reviewing court must '"examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect"'") (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 (1964) (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946))).

Bose did not, however, specifically decide whether independent review is applicable to cases involving commercial speech. The uncertainty left by *Bose* has led to a conflict among the courts of appeals on this question.

Like the Seventh Circuit in this case, the D.C. Circuit has held that the *Bose* standard does not apply to commercial speech cases. *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (1985) (reviewing district court decision that advertisement was misleading). The Fifth and Eleventh Circuits, by contrast, have applied independent, *de novo* review in cases involving restrictions on commercial speech, citing *Bose* for support. *Lindsay* v. *City of San Antonio*, 821 F.2d 1103, 1108 & n.9, 1110 & n.11 (5th Cir. 1987) (ban on portable street signs), cert. denied, 484 U.S. 1010 (1988); *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 & n.11 (11th Cir. 1992) ("we subject to independent examination the jury's finding that [the advertiser's] ad would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes"); *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (ban on portable street signs), cert. denied, 485 U.S. 981 (1988).[5]

This Court appeared to answer the question whether independent review is applicable in commercial speech cases in *Peel* v. *Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990), a case involving an issue quite similar to the one in this case. In *Peel*, the four-Justice plurality, citing *Bose*, explicitly stated that *de novo* review was required to determine whether an attorney's advertisement (consisting of a letterhead statement about his certification as a civil trial specialist) was misleading, and therefore unprotected, speech. *Id.* at 108. Justice

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[5] Moreover, the First and Third Circuits have held more broadly that *Bose*'s independent review standard applies in *all* First Amendment cases, including cases involving the Religion Clauses. *New Life Baptist Church Academy* v. *Town of East Longmeadow*, 885 F.2d 940, 941-942 (1st Cir. 1989), cert. denied, 494 U.S. 1066 (1990); *Bender* v. *Williamsport Area Sch. Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984), vacated for lack of standing, 475 U.S. 534 (1986).

Marshall and Justice White, while not explicitly citing *Bose*, also clearly engaged in independent review in deciding that issue. *Id.* at 111-115 (Marshall, J., concurring in the judgment); *id.* at 118 (White, J., dissenting).

Perhaps because of the fractured nature of the opinions in *Peel*, however, that case has failed to resolve the split in the circuits. Thus, since *Peel*, the Seventh Circuit in this case and the Eleventh Circuit in *Braun* have reached opposite conclusions on the issue of *Bose*'s applicability to commercial speech cases. See also *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836, 843 (D.P.R. 1990) (interpreting *Bose* and *Peel* as requiring independent review of agency's determination that advertisement was misleading).

The Seventh Circuit's opinion itself reflects the continuing uncertainty in the lower courts on this issue and demonstrates the need for a dispositive statement by this Court. The court below acknowledged that "*Peel* arguably extended *de novo* review to * * * commercial advertising." App., *infra*, 8a. Nevertheless, it stated, without explanation, that it did "not think that the [Supreme] Court intended that result," and suggested that only this Court could resolve the question whether commercial speech cases warrant *de novo* review. *Ibid.* (citing *Rodriguez de Quijas* v. *Shearson/American Express*, 490 U.S. 477, 484 (1989)). Review by this Court is therefore necessary to end the continuing confusion in the courts of appeals on this issue and to clarify the implications of *Bose* and *Peel* for commercial speech cases.

Moreover, review is especially warranted here because the Seventh Circuit's decision (as well as the D.C. Circuit's decision in *Brown & Williamson Tobacco Corp.*, on which the Seventh Circuit relied, see App., *infra*, 8a) is based on a clear misreading of *Bose*. In support of its holding that *de novo* review was inapplicable to this case, the Seventh Circuit stated that "*Bose* itself suggests that commercial speech might not warrant the higher standard of review established for libel cases." App., *infra*, 8a (citing 466 U.S. at 504 n.22). The *Bose* footnote cited by the Seventh Circuit, however, clearly does not stand for this proposition. In fact, it suggests the opposite.

The footnote is appended to a textual paragraph discussing the various categories of speech that are unprotected by the First Amendment. In the footnote, the Court explained why false and misleading commercial speech could *also* be deemed to represent a category of unprotected speech subject to government regulation. 466 U.S. at 504 n.22. But in the very same paragraph discussing these unprotected categories of speech, the Court stated that independent review is required in cases involving those categories to determine *whether* the speech in question actually falls within the unprotected category. *Id.* at 505. The footnote thus indicates that cases involving commercial speech that is allegedly false and misleading -- like cases involving speech that allegedly falls into other "unprotected" categories -- require independent review to determine whether the speech at issue in fact falls in that category. See Schmidt & Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. CIN. L. REV. 1273, 1286-1287 (1988).

B. *Bose* Applies to Cases Involving Review of Agency Decisions that Particular Speech Is Unprotected

The Seventh Circuit also declined to apply the *Bose* standard of independent, *de novo* review because of the FTC's alleged "expertise in the field of deceptive advertising." App., *infra*, 8a. That expertise, the court reasoned, justified a greater degree of deference to the FTC's findings than to findings by courts. *Id.* at 8a-9a. It therefore reviewed the FTC's ruling under the "highly deferential, substantial evidence test." *Id.* at 7a.

The Seventh Circuit's decision that it should defer to the agency's findings on a question that determines whether speech is protected by the First Amendment conflicts with this Court's precedents. *Bose* itself stated that independent review of findings that particular speech is unprotected is a "constitutional responsibility" that cannot be shirked on account of the identity of the trier of fact. 466 U.S. at 501. And in *Peel*, the Court engaged in independent, nondeferential review of the findings of a state administrative agency charged with regulating attorney advertising (and of the state supreme court) that an attorney's commercial speech was misleading. 496 U.S. at 97-98, 108 (plurality opinion);

id. at 111-115 (Marshall, J., concurring in the judgment). See also *id.* at 118 (White, J., dissenting).[6]

Similarly, in *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), the Court held that states must provide independent judicial review of determinations by state agencies that certain speech is unprotected by the First Amendment. See Monaghan, 85 COLUM. L. REV. at 269 ("*Freedman v. Maryland* may be taken to establish that administrative action focusing on the content of speech cannot be final, and that the Constitution requires independent judicial judgment on whether the speech is protected."). Certainly there is no reason to think that the findings of *federal* agencies should be treated more deferentially than those of *state* agencies that also can claim to have expertise over matters within their jurisdiction. See *Peel*, 496 U.S. at 108 ("That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity.") (plurality opinion).[7]

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[6] The court of appeals attempted to distinguish *Peel* on the ground that that case involved a "prophylactic regulation applicable to all lawyers," whereas this case involves review of an "individualized FTC cease and desist order, prohibiting a particular set of deceptive ads." App., *infra*, 9a. This supposed distinction, however, is both inaccurate and irrelevant. None of this Court's precedents suggests that *de novo* review is required only for general, "prophylactic" regulations. Indeed, *Bose* itself involved review of a specific finding that the defendant had acted with malice, not some widely applicable rule. See 466 U.S. at 493. Moreover, although *Peel* involved a state regulation applicable to all attorneys, the relevant issue in that case was identical to the issue here: whether the *particular* advertisement in question was misleading and therefore unprotected by the First Amendment and subject to governmental restriction. See 496 U.S. at 100, 107 n.15 (plurality opinion); *id.* at 111-116 (Marshall, J., concurring in the judgment); *id.* at 118 (White, J., dissenting); *id.* at 121-122 (O'Connor, J., dissenting). In short, *Bose* and *Peel* establish that *de novo* review is required whenever a trier of fact determines that particular speech is unprotected, regardless of the scope of the statute, regulation, or common law rule that provides the basis for the restriction on speech.

[7] The cases cited by the Seventh Circuit, App., *infra*, 9a, do not support (continued...)

Furthermore, the Seventh Circuit's decision to defer to the agency's findings in this case conflicts with the decisions of other circuits. In contrast to the Seventh Circuit, the D.C. and Fifth Circuits (in cases preceding *Bose* and *Peel*) have refused to apply the substantial evidence test to agency decisions restricting speech and have reviewed agency findings in such cases *de novo*. See *NBC, Inc.* v. *FCC*, 516 F.2d 1101, 1122 (D.C. Cir. 1974) (holding that courts have a "greater responsibility" in reviewing agency rulings under "fairness doctrine" that "upset [a broadcaster's] journalistic discretion * * * because the area is suffused with First Amendment freedoms"), cert. denied, 424 U.S. 910 (1976); *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1118 (D.C. Cir. 1969) (in case involving Department of Interior regulations restricting demonstrations near White House as means of protecting the President, agency's factual determinations regarding danger to President not entitled to deference because "[t]he expertise of those entrusted with the protection of the President does not qualify them to resolve First Amendment issues, the traditional province of the judiciary"); *Porter* v. *Califano*, 592 F.2d 770, 780 n.15 (5th Cir. 1979) (independent, nondeferential review of agency factfinding "is especially appropriate in the First Amendment area * * * [because] courts, not agencies, are expert on the First Amendment"). See also *Puerto Rico Tele-Com*, 747 F. Supp. at 843 (interpreting *Bose* and *Peel* as requiring independent review of Puerto Rico agency's determination that advertisement was misleading).

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[7] (...continued)
its holding that agency findings restricting speech are entitled to deference. *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), predates not only *Bose* and *Peel*, but also the extension of First Amendment protection to commercial speech in general. In addition, the Court in *Colgate-Palmolive* emphasized that "in the last analysis the words 'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." *Id.* at 385. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), though decided after *Bose*, says nothing about the standard of review to be applied in free speech cases in general, let alone to agency decisions implicating the First Amendment.

Finally, the Seventh Circuit's decision is inconsistent with the clear implications of this Court's rulings in cases involving review of other entities' decisions restricting speech. The Court has subjected state court findings limiting speech to nondeferential review even though federalism concerns and the Seventh Amendment (in cases involving jury trials) weigh against searching review by federal appellate courts. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285 n.26 (1964); *Bose*, 466 U.S. at 508-509 n.27. Similarly, the Court has applied "rigorous" review to congressional determinations that restrictions on campaign expenditures were necessary to prevent corruption or the appearance of corruption – even though Congress is surely "expert" in the area of campaign finance. See *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985); *Buckley* v. *Valeo*, 424 U.S. 1, 29 (1976). See also *Sable Communications* v. *FCC*, 492 U.S. 115, 129 (1989) ("'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'") (quoting *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978)). There is no conceivable reason why an agency's rationale for restricting speech should receive more deference than a similar decision by a state court or a coordinate branch of government.[8]

Indeed, the Seventh Circuit's ruling means that constitutional protection could well turn on the type of enforcement action adopted by the government. For example, a sexually explicit motion picture exhibited both in movie theaters and on television might be found obscene, and hence subject to prohibition, by both

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[8] The Seventh Circuit itself acknowledged that it seems "counter-intuitive to grant more deference to the Commission than to courts." App., *infra*, 8a. It justified such deference, though, on the ground that Commission findings "may require resolution of 'exceedingly complex and technical factual issues.'" *Id.* at 9a (quoting *Zauderer*, 471 U.S. at 645). The FTC's findings that Kraft's ads were implicitly misleading, however, involved no such "complex and technical" issues. Those findings depended solely on the commissioners' subjective impression of the ads' implied meaning. Certainly judges are no less capable than the FTC commissioners of looking at an ad and determining what they think it means. See pages 22-24, *infra*.

a court and the Federal Communications Commission. Under the Seventh Circuit's view, the court's determination would be subject to *de novo* review, while the FCC's would receive deference. The different standards of review, of course, could lead to different outcomes on appeal. This odd result illustrates why agency findings that determine whether speech is unprotected by the First Amendment should not receive more deference than the findings of courts or other factfinders.

In fact, if anything, independent review may even be *more* imperative where the decision of an administrative agency is at issue, for two reasons. First, the legitimacy under Article III and the Due Process Clause of administrative determination of facts affecting constitutional rights (including, but not limited to, the First Amendment) is conditioned on the availability of *de novo* judicial review. See *Crowell* v. *Benson*, 285 U.S. 22, 55-61 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 51-52 (1936); *Ng Fung Ho* v. *White*, 259 U.S. 276, 284-285 (1922); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, 289 (1920). See also Monaghan, 85 COLUM. L. REV. at 247-254; *id.* at 276 ("When the initial decisionmaker is an administrative agency, [independent] review [of facts affecting constitutional rights] may be compelled because administrative action suffers from a so-called legitimacy deficit.").

Second, agencies' very reason for existence -- regulating private conduct -- makes them less sensitive than courts to constitutional protections that restrain their regulatory authority. See *Freedman*, 380 U.S. at 58 ("[t]he teaching of our cases is that * * * only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression").[9] Independent

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[9] See also Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 520-24 (1970); Note, *"New and Improved": Procedural Safeguards for Distinguishing Commercial from Noncommercial Speech*, 88 COLUM. L. REV. 1821, 1825 (1988) ("Governmental agencies empowered to restrain speech tend inexorably towards restraint. They cannot be relied on to be sensitive to first amendment concerns because their very reason for existence is rooting out violations of the statutory

(continued...)

review is particularly important to check an agency's inherent insensitivity to free speech interests in cases such as this, in which the agency's determination is based not on reliable, objective evidence, but on the subjective, intuitive, and predisposed assessment of agency officials. See pages 22-24, *infra*.

II. THE FTC MAY NOT DETERMINE THAT AN ADVERTISEMENT IS IMPLICITLY MISLEADING TO CONSUMERS BASED SOLELY ON ITS OWN REACTION TO THE AD

The Court also should grant certiorari to determine whether the FTC Act permits the Commission to find that an advertisement is implicitly misleading based solely on its own reading of the ad. Review is essential here because the Commission's interpretation of the Act conflicts with the courts' interpretation of similar provisions in the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) and will have a severe chilling effect on truthful, nonmisleading commercial speech.

A. The Commission's Interpretation of the FTC Act Conflicts With the Courts' Interpretation of the Lanham Act

Both the FTC Act (15 U.S.C. §§ 45(a)(1), 52(a) and (b), 55(a)(1)) and Section 43(a) of the Lanham Trade-Mark Act (15 U.S.C. § 1125(a)) prohibit "false" or "misleading" advertising. The principal difference between the two statutes lies in their enforcement schemes. The FTC Act empowers the Federal Trade Commission to issue cease and desist orders against violators and to obtain monetary penalties; the Lanham Act provides a private right of action for persons damaged or likely to be damaged by a false advertisement.

Otherwise, the conduct prohibited by the two statutes is identical. Both statutes have been construed to prohibit not only

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[9] (...continued)
schemes they are mandated to enforce."); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 76-77 (1984) ("Nonjudicial administrative regulations of expressions exist for the sole purpose of regulating; this is their raison d'etre.").

ads that are expressly false, but also ads that, while true on their face, convey misleading implications. And for both statutes, an ad is deemed to convey a misleading implication if a significant number of "reasonable consumers" perceive that implication. See App., *infra*, 38a-40a; *Avis Rent A Car Sys., Inc.* v. *Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986); *American Home Prods. Corp.* v. *Johnson & Johnson*, 577 F.2d 160, 165-166, 172 (2d Cir. 1978).

The approach adopted by the FTC in this case (and approved by the Seventh Circuit), however, creates a substantial difference in the proof required under the two statutes to establish false advertising. The Commission has construed the FTC Act to permit it to find that an advertisement makes an *impliedly* misleading claim merely by reading the ad, without requiring any objective evidence of how actual consumers view the ad. In contrast, to prevail under the Lanham Act, a plaintiff must offer reliable extrinsic evidence, such as consumer surveys, showing that consumers perceive the false claim allegedly implied by the ad. See, *e.g.*, *Abbott Labs.* v. *Mead Johnson & Co.*, 971 F.2d 6, 14 (7th Cir. 1992); *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 228-229 (3d Cir. 1990); *Avis Rent A Car Sys.*, 782 F.2d at 386; *Tambrands, Inc.* v. *Warner-Lambert Co.*, 673 F. Supp. 1190, 1198 (S.D.N.Y. 1987); *Fruit of the Loom, Inc.* v. *Sara Lee Corp.*, 674 F. Supp. 1020, 1021 & n.2 (S.D.N.Y. 1986); *Upjohn Co.* v. *American Home Prods. Corp.*, 598 F. Supp. 550, 556 (S.D.N.Y. 1984); *Borden, Inc.* v. *Kraft, Inc.*, 224 U.S.P.Q. 811 (N.D. Ill. 1984); *U-Haul Int'l, Inc.* v. *Jartran, Inc.*, 522 F. Supp. 1238, 1248-1249 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982). See also 2 J.T. McCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 27:7, at 366 (2d ed. 1984); *id.* § 32:54, at 788; Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 526 (1989). As the court stated in one of the leading Lanham Act cases on this subject:

> [W]e are asked to determine whether a statement acknowledged to be literally true and grammatically correct nevertheless has a tendency to mislead, confuse or deceive. As to such a proposition "the public's reaction to [the] advertisement will be the starting point in any discussion of the

> likelihood of deception." * * * A court may, of course, construe and parse the language of the advertisement. It may have personal reactions as to the defensibility or indefensibility of the deliberately manipulated words. * * * [B]ut the court's reaction is at best not determinative and at worst irrelevant.

American Brands, Inc. v. *R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976) (citation omitted).

This stark conflict in the way the two statutes are implemented creates an anomalous situation: if a manufacturer of imitation cheese slices had sued Kraft in federal district court under the Lanham Act and made the *exact same allegations* as the FTC did in this case, the court would have required extrinsic evidence, such as consumer surveys, showing that reasonable consumers would perceive the milk equivalency and imitation superiority claims in Kraft's ads. Indeed, the Seventh Circuit candidly conceded that if "this [were] a Lanham Act case, a reviewing court in all likelihood would have relied on extrinsic evidence of consumer perceptions." App., *infra*, 12a.[10] Yet the court below allowed the FTC to brand Kraft's ads as false and misleading, and to impose a severe penalty, without requiring such proof.

This Court should grant review to resolve this anomaly. There is simply no good reason why the Commission should be allowed to dispense with extrinsic evidence in FTC Act cases when courts regularly require such evidence in making precisely the same inquiry under the Lanham Act.

The sole reason offered by the Seventh Circuit for not following the practice of courts in Lanham Act cases is that the FTC allegedly possesses greater "expertise" than do judges and juries in interpreting advertisements. App., *infra*, 14a. This rationale, however, has been frequently and intensely criticized.

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[10] In fact, in *Borden, Inc.* v. *Kraft, Inc.*, 224 U.S.P.Q. at 819, a court required just such evidence when one of Kraft's competitors, Borden, Inc., claimed that Kraft's ads falsely implied that Borden cheese slices are made with less milk. The court found, moreover, that the extrinsic evidence showed that the ads did *not* convey the alleged claim. *Id.* at 819-821.

See, *e.g.*, Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 OR. L. REV. 561, 572, 602 (1983); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 677-678 (1977); LaRue, *FTC Expertise: A Legend Examined*, 16 ANTITRUST BULL. 1 (1971); Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 KAN. L. REV. 625 (1969); Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 KAN. L. REV. 559, 564-565 (1969); Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 470-471 (1964). The commissioners simply lack the specialized background or cumulative experience in interpreting advertisements that would justify a presumption of administrative expertise. As Professor Robert Pitofsky wrote after serving as Director of the FTC's Bureau of Consumer Protection (and before his appointment as a commissioner):

> Why questions of meaning should be submitted to the virtually unreviewable discretion of five commissioners of the FTC has never been articulated. Unlike other instances of deference to regulators as part of the administrative process, there is no reason to believe that commissioners of the FTC have unusual capacity or experience in coping with questions of meaning, nor any indication that successful regulation of advertising requires a balance of related regulatory considerations that commissioners are in a special position to handle.

Pitofsky, 90 HARV. L. REV. at 678. See also Millstein, 64 COLUM. L. REV. at 492-493 (commissioners are not "any more capable of ascertaining the meaning of an advertisement's promise * * * than any other five men * * * or reviewing court").

Moreover, even assuming that the FTC is expert at reading ads per se, no amount of expertise or experience can enable the Commission to predict, merely by looking at an ad, how *reasonable consumers* would interpret the ad -- the very inquiry the FTC is supposed to be making. Consumers' perceptions depend on a host of factors apart from the wording of the ad, including consumers' different cultural, social, and educational backgrounds, their prior experiences with the product advertised, the environment in which they view the ad, and the editorial or program content

surrounding the ad. See Pollay, 17 KAN. L. REV. at 629-631; Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 658, 672-674, 717 (1985); Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 43(a) of the Lanham Act*, 77 VA. L. REV. 339, 348 (1991). The multiplicity of variables and the unpredictability of their interactive effect on perception make it impossible to determine accurately, merely by examining the ad itself, what implicit messages consumers will derive from the ad. See Comment, 62 OR. L. REV. at 572 ("since the commissioners are highly trained attorneys with very specialized views of advertising, they lack the perspective to accurately identify the meaning given to an advertisement by the general public") (citation omitted). Yet the Commission's approach does not even purport to take account of these external factors in determining how "reasonable consumers" will interpret the ad.

In addition, the FTC's supposed expertise cannot overcome the fundamental problem of the Commission's predisposition to perceive a false message in an advertisement once a complaint has been filed alleging that the ad implies that message. Regardless of how diligently a commissioner may try to step back and view an ad with fresh eyes and ears, there is no way of erasing from his memory the message that the ad is said to convey. The very nature of his task requires that the message be at the forefront of his mind. It is impossible, then, for the FTC to put itself in the shoes of the unbiased consumer who does not know what message he is supposed to look for. See Pollay, 17 KAN. L. REV. at 636 (FTC's "hypothetical suppositions about how consumers might interpret an advertisement * * * ought always to lead to a judgment of the advertisement's capacity to deceive").

For these reasons, the FTC should be required to follow the courts' practice in Lanham Act cases and require objective, extrinsic evidence that a significant number of consumers will perceive an implied claim before it may brand an ad deceptive. See Gellhorn, 17 KAN. L. REV. at 565, 567 (criticizing FTC's "intuitive" or "hunch" method of determining deceptiveness and urging reliance on consumer surveys); Pollay, 17 KAN. L. REV. 625 (same); Comment, 62 OR. L. REV. at 572, 602 (same).

B. The FTC's Practice Chills Truthful, Nonmisleading Advertising

The FTC's practice of relying on its own reading of an ad to find implied claims also will have a significant chilling effect on truthful, nonmisleading advertising. Even if this chilling effect does not rise to the level of a constitutional violation, it provides a compelling reason why the FTC Act should be interpreted as requiring objective, extrinsic evidence of implied claims. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress") (citing *NLRB* v. *Catholic Bishop*, 440 U.S. 490, 499-501, 504 (1979)).

The Seventh Circuit (particularly Judge Manion) recognized that the FTC's reliance on its own subjective interpretation to determine whether an ad, while literally true, implies a false message threatens to chill nonmisleading, protected speech because advertisers will be unable to predict whether the FTC will find particular ads misleading. See App., *infra*, 16a, 27a-28a. An advertiser (such as Kraft in this case) might run an advertisement after conducting extensive pre-dissemination surveys showing that consumers will not be misled by the ad, only to have the Commission decide that, in its subjective judgment, consumers could be misled. Advertisers accordingly will avoid any speech that the FTC might find misleading.

The ads most vulnerable to this chilling effect are those that provide comparative factual information -- the types of ads that are most helpful to consumers. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-765 (1976) (noting that the "free flow" of comparative and factual information is "indispensable" to intelligent consumer decision-making and to the proper allocation of resources in a free enterprise system). Fearful that the Commission might find that such ads imply false, though unintended, meanings, advertisers will switch to "soft," feel-good ads that say little or nothing about the product or service being promoted. See Schmidt & Burns, 56 U. CIN. L.

REV. at 1293; Note, 77 VA. L. REV. at 383, 394. Consumers will be the ones ultimately harmed by this result.

Because the Commission's reliance on its own interpretation of an ad to determine whether it makes impliedly misleading claims chills protected speech, the Commission should be required to discard that method in favor of one that allows it to recognize and eliminate misleading speech without simultaneously suppressing truthful information. Cf. *In re R.M.J.*, 455 U.S. 191, 203 (1982) (restriction on deceptive commercial speech may not be "broader than reasonably necessary to prevent the deception"). The FTC Act, like the Lanham Act, therefore should be interpreted as requiring objective extrinsic evidence of an ad's meaning to consumers. Only then would advertisers be able to predict whether particular ads might be found impliedly misleading.

Although it acknowledged the chilling effect that the FTC's practice would have on truthful, nonmisleading advertisements and recognized the "force of Kraft's argument as a policy matter," App., *infra*, 14a-16a, the Seventh Circuit held that this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), "doomed" Kraft's challenge to the FTC's practice. App., *infra*, 15a; *id.* at 27a-28a (Manion, J., concurring). In fact, though, *Zauderer* merely held that the *First Amendment* did not require survey evidence to prove that the particular ad in that case was misleading. 471 U.S. at 650-653. It said nothing about whether the *FTC Act* required such extrinsic evidence. Indeed, *Zauderer* did not even involve the FTC Act, but concerned state disciplinary rules governing attorney advertising. Moreover, the Court in *Zauderer* did not consider the possible chilling effect on nonmisleading speech that could arise from the State's failure to rely on extrinsic evidence. See 471 U.S. at 652-653.

In any event, even if *Zauderer* were relevant to the interpretation of the FTC Act, it does not support the FTC's reliance on its own reading of an ad to find *implied* claims because the ad in that case was misleading *on its face*. In *Zauderer*, a lawyer's advertisement promised that "if there is no recovery, no legal fees are owed by our clients." Losing clients were, however, responsible for costs. Because "legal fees" and "costs" are, in "ordinary usage," "virtually interchangeable" (471 U.S. at 652), the

ad was facially misleading. A consumer who read the ad and applied normal definitions to the terms used would conclude that an unsuccessful client would not have to pay costs. Thus, this Court held that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" *Id.* at 652-653 (quoting *Colgate-Palmolive Co.*, 380 U.S. at 391-392).[11]

But where, as here, the alleged false claims are derived not from common understandings of the actual words in an ad, but from the inferences and deductions that consumers supposedly would make from those words, the claims cannot be said to be "self-evident" from the face of the ad. Contrary to the Seventh Circuit's decision, then, *Zauderer* provides no support for the FTC's reliance on its own reading of an ad where the alleged claims are merely implied.

III. THE QUESTIONS PRESENTED HAVE GREAT LEGAL AND PRACTICAL SIGNIFICANCE

The importance of the issues raised here goes well beyond the confines of this case. The question concerning the appropriate standard of review in commercial speech cases affects not just FTC decisions, but all cases in which the application of a statute, regulation, or common law rule restricts or imposes liability on the basis of commercial speech. Similarly, the question whether the *Bose* independent review standard applies to review of agency

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[11] Similarly, the ad in *Colgate-Palmolive* was also misleading on its face. To prove the moisturizing capability of the company's shaving cream, Colgate-Palmolive's advertisement displayed a "demonstration" of a razor shaving what appeared to be sandpaper but what was actually a "mock-up" of plexiglass coated with sand. The audio portion of the ad *expressly* stated that the substance being shaved was actually sandpaper: "'To prove RAPID SHAVE'S super-moisturizing power, we put it right from the can onto this tough, dry sandpaper. It was apply . . . soak . . . and off in a stroke.'" 380 U.S. at 376. In any event, *Colgate-Palmolive* preceded the extension of First Amendment protection to commercial speech, and so did not consider the chilling effect that the FTC's decision would have on truthful advertising.

decisions is significant for all cases in which an agency decision has the effect of limiting speech, whether the speech is commercial, political, artistic, educational, or otherwise.

Finally, the chilling effect of the FTC's approach to interpreting advertisements will be felt not only by Kraft, but by all persons and businesses who rely on advertisements to promote their products and services. Indeed, the FTC itself has touted this case as a signal to advertisers of its new aggressiveness in regulating commercial speech. See Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3; Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991), at 2, 4. See also Landler, Schiller & Smart, *Suddenly, Green Marketers Are Seeing Red Flags*, BUS. WK., Feb. 25, 1991, at 74; Quinn, *FTC Is Back in Business of Weeding Out False Ads*, WASH. POST, Feb. 24, 1991, at H3; Foltz, *The Media Business: Advertising; F.T.C. Signals Its Concerns Over Deceptive Campaigns*, N.Y. TIMES, Feb. 14, 1991, at D19. What the FTC has failed to recognize, however, is the deleterious impact its approach will have on truthful, informative ads that are of the greatest value to consumers -- the people whose interests the Commission is supposed to protect. Certiorari should therefore be granted to resolve the important issues presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

No. 91-1691

KRAFT, INC.

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order of the Federal Trade Commission

ARGUED JANUARY 17, 1992--DECIDED JULY 31, 1992

Before FLAUM and MANION, *Circuit Judges*, and CURRAN, *District Judge.*[*]

FLAUM, *Circuit Judge*. Kraft, Inc. ("Kraft") asks us to review an order of the Federal Trade Commission ("FTC" or "Commission") finding that it violated §§ 5 and 12 of the Federal

[*] The Honorable Thomas J. Curran, District Judge of the United States District Court for the Eastern District of Wisconsin, sitting by designation.

Trade Commission Act ("Act"), 15 U.S.C. §§ 45, 52. The FTC determined that Kraft, in an advertising campaign, had misrepresented information regarding the amount of calcium contained in Kraft Singles American Pasteurized Process Cheese Food ("Singles") relative to the calcium content in five ounces of milk and in imitation cheese slices. The FTC ordered Kraft to cease and desist from making these misrepresentations and Kraft filed this petition for review. We enforce the Commission's order.

I.

Three categories of cheese compete in the individually wrapped process slice market: process cheese food slices, imitation slices, and substitute slices. Process cheese food slices, also known as "dairy slices," must contain at least 51% natural cheese by federal regulation. 21 C.F.R. § 133.173(a)(5). Imitation cheese slices, by contrast, contain little or no natural cheese and consist primarily of water, vegetable oil, flavoring agents, and fortifying agents. While imitation slices are as healthy as process cheese food slices in some nutrient categories, they are as a whole considered "nutritionally inferior" and must carry the label "imitation." *Id.* at § 101.3(e)(4). Substitute slices fit somewhere in between; they fall short of the natural cheese content of process cheese food slices yet are nutritionally superior to imitation slices. *Id.* at § 101.3(e)(2). Consistent with FTC usage, we refer to both imitation and substitute slices as "imitation" slices.

Kraft Singles are process cheese food slices. In the early 1980s, Kraft began losing market share to an increasing number of imitation slices that were advertised as both less expense and equally nutritious as dairy slices like Singles. Kraft responded with a series of advertisements, collectively known as the "Five Ounces of Milk" campaign, designed to inform consumers that Kraft Singles cost more than imitation slices because they are made from five ounces of milk rather than less expense ingredients. The ads also focused on the calcium content of Kraft Singles in an effort to capitalize on growing consumer interest in adequate calcium consumption.

The FTC filed a complaint against Kraft charging that this advertising campaign materially misrepresented the calcium content and relative calcium benefit of Kraft Singles. The FTC Act makes it unlawful to engage in unfair or deceptive commercial practices, 15 U.S.C. § 45, or to induce consumers to purchase certain products through advertising that is misleading in a material respect. *Id.* at §§ 52, 55. Thus, an advertisement is deceptive under the Act if it is likely to mislead consumers, acting reasonably under the circumstances, in a material respect. *Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-66 (1984); *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174 (1984) (appended to *Cliffdale Assocs.*) [hereinafter "FTC Policy Statement"]. In implementing this standard, the Commission examines the overall net impression of an ad and engages in a three-part inquiry: (1) what claims are conveyed in the ad; (2) are those claims false or misleading; and (3) are those claims material to prospective consumers.

Two facts are critical to understanding the allegations against Kraft. First, although Kraft does use five ounces of milk in making each Kraft Single, roughly 30% of the calcium contained in the milk is lost during processing. Second, the vast majority of imitation slices sold in the United States contain 15% of the U.S. Recommended Daily Allowance (RDA) of calcium per ounce, roughly the same amount contained in Kraft Singles. Specifically then, the FTC complaint alleged that the challenged advertisements made two implied claims, neither of which was true: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency" claim); and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim).[1]

The two sets of ads at issue in this case, referred to as the "Skimp" ads and the "Class Picture" ads, ran nationally in print and

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[1] Because Kraft concedes that these claims, if made, are false, the second step of the aforementioned inquiry--whether the alleged claims are false--is not before us on appeal.

broadcast media between 1985 and 1987. The Skimp ads were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to their milk and calcium content. The broadcast version of this ad on which the FTC focused contained the following audio copy:

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her? So I buy Kraft Singles. Imitation slices use hardly any milk. But Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow. No, she doesn't know what that big Kraft means. Good thing I do.
>
> *Singers:* Kraft Singles. More milk makes 'em . . . more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

See CX 62C & Z-72 (television ad); CX 62 Z-33 (print ad); Complaint ¶ 5 and Exs. A-D; IDF 26, 44.[2] The visual image corresponding to this copy shows, among other things, milk pouring into a glass until it reaches a mark on the glass denoted "five ounces." The commercial also shows milk pouring into a glass which bears the phrase "5 oz. milk slice" and which gradually becomes part of the label on a package of Singles. In January 1986, Kraft revised this ad, changing "Kraft *has* five ounces per slice" to "Kraft is *made from* five ounces per slice," IDF 28; *see* CX 276F, CX 106 (emphasis added), and in March 1987, Kraft added the disclosure, "one 3/4 ounce slice has 70% of the calcium of five ounces of milk" as a subscript in the television commercial and as a footnote in the print ads.

The Class Picture ads also emphasized the milk and calcium content of Kraft Singles but, unlike the Skimp ads, did not make an express comparison to imitation slices. The version of this ad

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[2] References to the record are abbreviated as follows:

IDF -initial decision finding
CX -complaint counsel's exhibit
Tr. -transcript of testimony

examined by the FTC depicts a group of school children having their class picture taken, and contains the following audio copy:

> *Announcer (voice over)*: Can you see what's missing in this picture?
>
> Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why Kraft Singles are important. Kraft is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth!
>
> *Photographer*: Say Cheese!
>
> *Kids*: Cheese!
>
> *Announcer (voice over)*: Say Kraft Singles. 'Cause kids love Kraft Singles, right down to their bones.

See CX 2751 & CX 62 Z-11 (television ad); CX 62 Z-55 (print ad); *see also* IDF 38. The Class Picture ads also included the subscript disclaimer mentioned above.

After a lengthy trial, the Administrative Law Judge (ALJ) concluded that both the Skimp and Class Picture ads made the milk equivalency claim. Specifically, the ALJ found that the juxtaposition of references to milk and calcium, along with the failure to mention that calcium is lost in processing, implied that each Kraft Single contains the same amount of calcium as five ounces of milk, and that the altered audio copy and subscript disclosure were confusing and inconspicuous and thus insufficient to dispel this impression. Further, the ALJ concluded that both sets of ads falsely conveyed the imitation superiority claim; he determined that reasonable consumers would take away the net impression that Kraft Singles contain more calcium than imitation slices because Kraft Singles contain five ounces of milk and imitation slices have little or no milk. According to the ALJ, both claims were material because they implicated important health concerns. He therefore ordered Kraft to cease and desist from making these claims about any of its individually wrapped slices of process cheese food, imitation cheese, or substitute cheese.

The FTC affirmed the ALJ's decision, with some modifications. *In re Kraft, Inc.*, FTC No. 9208 (Jan. 30, 1991). As to the Skimp ads, the Commission found that four elements conveyed the milk equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces per slice"; (2) repetition of the precise amount of milk in a Kraft Single (five ounces); (3) the use of the word "so" to link the reference to milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to a five-ounce mark, and the superimposition of that image onto a package of Singles. It also found two additional elements that conveyed the imitation superiority claim: (1) the express reference to imitation slices combined with the use of comparative language ("hardly any," "but"); and (2) the image of a glass containing very little milk during the reference to imitation slices, followed by the image of a glass being filled to the five-ounce mark during the reference to Kraft Singles. The Commission based all of these findings on its own impression of the advertisements and found it unnecessary to resort to extrinsic evidence; it did note, however, that the available extrinsic evidence was consistent with its determinations.

The Commission then examined the Class Picture ads -- once again, without resorting to extrinsic evidence -- and found that they contained copy substantially similar to the copy in the Skimp ads that conveyed the impression of milk equivalency. It rejected, however, the ALJ's finding that the Class Picture ads made an imitation superiority claim, determining that the ads neither expressly compared Singles to imitation slices, nor contained any visual images to prompt such a comparison, and that available extrinsic evidence did not support the ALJ's finding.

The FTC next found that the claims were material to consumers. It concluded that the milk equivalency claim is a health-related claim that reasonable consumers would find important and that Kraft believed that the claim induced consumers to purchase Singles. The FTC presumed that the imitation superiority claim was material because it found that Kraft intended to make that claim. It also found that the materiality of that claim was demonstrated by evidence that the challenged ads led to increased sales despite a substantially higher price for Singles than for imitation slices.

Finally, the FTC modified the ALJ's cease and desist order by extending its coverage from "individually wrapped slices of cheese, imitation cheese, and substitute cheese" to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese." The Commission found that the serious, deliberate nature of the violation, combined with the transferability of the violations to other cheese products, justified a broader order. Kraft filed this petition to set-aside the Commission's order or, alternatively, to modify its scope.

II.

Our standard for reviewing FTC findings has been traditionally limited to the highly deferential, substantial evidence test. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1976); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987). However, Kraft argues as a threshold matter that two recent Supreme Court decisions, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11, (1984), and *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), compel us to review the FTC's factual findings *de novo* because they implicate Kraft's first amendment commercial speech rights.

A deferential standard in reviewing FTC findings long predates *Bose* and *Peel*. In *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the Supreme Court held that while the words "deceptive advertising" set forth a legal standard that derives its final meaning from judicial construction, an FTC finding is "to be given great weight by reviewing courts" because it "rests so heavily on inference and pragmatic judgment" and in light of the frequency with which the Commission handles these cases. *Id.* at 385. However, *Colgate-Palmolive* preceded the extension of first amendment protection to commercial speech, *see, e.g.*, *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976), and subsequent cases examining the contours of that right.

Bose was a libel case holding that appellate courts have a constitutional responsibility to review *de novo* a lower court finding of fact that a defamatory statement was made with actual malice. *Bose*, 466 U.S. at 510-11. The Court declared that judges, as

expositors of the Constitution, must independently decide whether evidence in the record is sufficient to strip allegedly libelous speech of first amendment protection. The Court, however, explicitly left unresolved the question of whether this higher standard of review extended to commercial speech cases. *Id.* at 504 n.22. Kraft asserts that the Court has since answered that question. *Peel* held that a state regulation prohibiting attorneys from advertising a specialty or certification violated the first amendment and, significantly, a plurality of four Justices reviewed this issue *de novo*, *Peel*, 496 U.S. at 108 (citing *Bose*), while Justice Marshall, writing separately, and providing a fifth vote, apparently did so as well. *Id.* at 111-117 (concurring opinion). Thus, *Peel* arguably extended *de novo* review to another sub-category of constitutionally protected speech, commercial advertising.

Nonetheless, we decline to apply *de novo* review in this context. For one, the implications of *Bose* are not as clear as Kraft suggests, see *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985) (refusing to extend *Bose* to the commercial speech context); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 244-47 (1985), and *Bose* itself suggests that commercial speech might not warrant the higher standard of review established for libel cases. *Bose*, 466 U.S. at 504 n.22 (commercial speech generally considered less susceptible to the chilling effect of state regulation than other forms of speech). Although one might argue that *Bose* and *Peel* operating in tandem effectively overrule *Colgate-Palmolive*, we do not think that the Court intended that result. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has a direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [Courts] of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). Moreover, there are important distinctions between the sort of appellate review conducted in *Bose* and *Peel* and that done in *Colgate-Palmolive* and this case. The former involved review of court decisions, and courts generally lack the Commission's expertise in the field of deceptive advertising. While it could be posited that it is counter-intuitive to grant more deference to the Commission than to courts,

Commission findings are well-suited to deferential review because they may require resolution of "exceedingly complex and technical factual issues." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 645 (1985); *see also Colgate-Palmolive*, 380 U.S. at 385. In addition, the determination of whether an ad has a tendency to deceive is an impressionistic one more closely akin to a finding of fact than a conclusion of law. *National Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 161 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Most important, the restriction challenged in *Peel* is a completely different animal than the one challenged here. In *Peel*, the issue was whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech, passed constitutional muster.[3] *Peel*, 496 U.S. at 108-09 (plurality); id. at 111 (concurrence). Here, by contrast, the issue is whether an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads, passes constitutional muster. *See Zauderer*, 471 U.S. at 645-46 (assessing deceptive advertising under the FTC Act a qualitatively different and more complex task than assessing the validity of a state attorney advertising regulation). We find the restriction at issue in *Peel* and the one here sufficiently distinct to justify differing levels of appellate review. Accordingly, we decline to review *de novo* the FTC's findings and, with the substantial evidence test in mind, turn to the facts of this case.

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[3] Kraft disputes this characterization of *Peel*, arguing the Supreme Court was reviewing a specific agency finding of deceptive advertising rather than the state regulation itself. While it is true that the Court examined the state regulation "as applied" to Peel, *Peel*, 469 U.S. at 107 n.15 (plurality); id. at 117 n.1 (concurrence), that does not change the fact that the Court was confronted with a general regulation applicable to all lawyers rather than an administrative order applicable only to a single entity, such as the one Kraft challenges here.

III.

Kraft makes numerous arguments on appeal, but its principal claim is that the FTC erred as a matter of law in not requiring extrinsic evidence of consumer deception. Without such evidence, Kraft claims (1) that the FTC had no objective basis for determining if its ads actually contained the implied claims alleged, and (2) that the FTC's order chills constitutionally protected commercial speech. Alternatively, Kraft contends that substantial evidence does not support the FTC's finding that the Class Picture ads contain the milk equivalency claim. Finally, Kraft maintains that even if it did make the alleged milk equivalency and imitation superiority claims, substantial evidence does not support the FTC's finding that these claims were material to consumers. We address each contention in turn.

A.

1.

In determining what claims are conveyed by a challenged advertisement, the Commission relies on two sources of information: its own viewing of the ad and extrinsic evidence. Its practice is to view the ad first and, if it is unable on its own to determine with confidence what claims are conveyed in a challenged ad, to turn to extrinsic evidence. *Thompson Medical*, 104 F.T.C. at 788-89; *Cliffdale Assocs.*, 103 F.T.C. 110, 164-66 (1984); *FTC Policy Statement*, 103 F.T.C. at 176. The most convincing extrinsic evidence is a survey "of what consumers thought upon reading the advertisement in question," *Thompson Medical*, 104 F.T.C. at 788-89, but the Commission also relies on other forms of extrinsic evidence including consumer testimony, expert opinion, and copy tests of ads. *FTC Policy Statement*, 103 F.T.C. at 176 n.8.

Kraft has no quarrel with this approach when it comes to determining whether an ad conveys *express* claims, but contends that the FTC should be required, as a matter of law, to rely on extrinsic evidence rather than its own subjective analysis in all cases

involving allegedly *implied* claims.[4] The basis for this argument is that implied claims, by definition, are not self-evident from the face of an ad. This, combined with the fact that consumer perceptions are shaped by a host of external variables -- including their social and educational backgrounds, the environment in which they view the ad, and prior experiences with the product advertised, *see* Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U.L. Rev. 658, 672-74, 717 (1985); Richard Pollay, *Deceptive Advertising and Consumer Behavior: A Case for Legislative and Judicial Reform*, 17 U. Kan. L. Rev. 625, 629-31 (1969) -- makes review of implied claims by a five-member commission inherently unreliable. The Commissioners, Kraft argues, are simply incapable of determining what implicit messages consumers are likely to perceive in an ad. Making matters worse, Kraft asserts that the Commissioners are predisposed to find implied claims because the claims have been identified in the complaint, rendering it virtually impossible for them to reflect the perceptions of unbiased consumers. *See* Comment, *The Use and Reliability of Survey Evidence in Deceptive Advertising Cases*, 62 Or. L. Rev. 561, 572 (1983) ("since the commissioners are highly trained attorneys with very specialized views of advertising, they lack the perspective to accurately identify the meaning given an advertisement by the general public").

Kraft buttresses its argument by pointing to the use of extrinsic evidence in an analogous context: cases brought under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). Courts hearing deceptive advertising claims under that Act, which provides a private right of

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[4] Express claims directly represent the fact at issue while implied claims do so in an oblique or indirect way. *Thompson Medical*, 104 F.T.C. at 788. To illustrate, consider the following. Suppose a certain automobile gets poor gas mileage, say, 10 miles per gallon. One advertisement boasts that it gets 30 miles per gallon while another identifies the car as the "Miser," depicts it rolling through the countryside past one gas station after another, and proclaims that the car is inexpensive to operate. Both ads make deceptive claims: the first does so expressly, the second does so impliedly.

action for deceptive advertising, generally require extrinsic proof that an advertisement conveys an implied claim. *See, e.g., Avis Rent A Car System, Inc. v. Hertz Corp.*, 782 F.2d 381, 386 (2d Cir. 1986); *Tambrands, Inc. v. Warner-Lambert Co.*, 673 F. Supp. 1190, 1198 (S.D.N.Y. 1987); *see generally* Ivan L. Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 Trademark Rep. 508, 526 (1989). Were this a Lanham Act case, a reviewing court in all likelihood would have relied on extrinsic evidence of consumer perceptions. While this disparity is sometimes justified on grounds of advertising "expertise" -- the FTC presumably possesses more of it than courts, *see American Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 172 n.27. (2d Cir. 1978) -- Kraft maintains this justification is an illusory one in that the FTC has no special expertise in discerning consumer perceptions. *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 678 (1977); Ernest Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. Kan. L. Rev. 559, 564-65 (1969). Indeed, proof of the FTC's inexpertise abounds: false advertising cases makes up a small part of the Commission's workload, *see* Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. B.J. 548, 571 (1964), most commissioners have little prior experience in advertising, *see* Paul H. LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971), and the average tenure of commissioners is very brief. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 86 (1969) (average tenure of four years). That evidence aside, no amount of expertise in Kraft's view can replace the myriad of external variables affecting consumer perceptions. Here, the Commission found implied claims based solely on its own intuitive reading of the ads (although it did reinforce that conclusion by examining the proffered extrinsic evidence). Had the Commission fully and properly relied on available extrinsic evidence, Kraft argues it would have conclusively found that consumers do not perceive the milk equivalency and imitation superiority claims in the ads.

While Kraft's arguments may have some force as a matter of policy, they are unavailing as a matter of law. Courts, including

the Supreme Court, have uniformly rejected imposing such a requirement on the FTC, *see Colgate-Palmolive*, 380 U.S. at 391-92 (FTC not required to conduct consumer surveys before determining that a commercial has a tendency to mislead); *National Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part*, 348 U.S. 940 (1955); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944); *accord Bristol-Myers Co. v. FTC*, 738 F.2d 554, 563 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985); *American Home Prods. Co. v. FTC*, 695 F.2d 681, 687 n.10 (3d Cir. 1982); *Simeon Management Corp. v. FTC*, 579 F.2d 1137, 1146 n. 11 (9th Cir. 1978); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985); *Thompson Medical*, 791 F.2d at 197, and we decline to do so as well. We hold that the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement.

Kraft's case for a per se rule has two flaws. First, it rests on the faulty premise that implied claims are inescapably subjective and unpredictable. In fact, implied claims fall on a continuum, ranging from the obvious to the barely discernible. *Thompson Medical*, 104 F.T.C. at 788-89. The Commission does not have license to go on a fishing expedition to pin liability on advertisers for barely imaginable claims falling at the end of this spectrum. However, when confronted with claims that are implied, yet conspicuous, extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to makes its findings. *See Colgate-Palmolive*, 380 U.S. at 391-92 (FTC need not conduct a consumer survey in finding commercial misleading); *cf. Zauderer*, 471 U.S. at 652-53 (implied claims that are self-evident do not require the State to conduct a public survey before finding advertisement misleading). The implied claims Kraft made are reasonably clear from the face of the advertisements, and hence the Commission was not required to utilize consumer surveys in reaching its decision.

Second, Kraft's reliance on Lanham Act decisions is misplaced. For one, not all courts applying the Lanham Act rely on extrinsic evidence when confronted with implied claims, *see,*

e.g., *Better Business Bureau, Inc. v. Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982); *American Home Prods. v. Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987), but more importantly, when they do, it is because they are ill equipped -- unlike the Commission -- to detect deceptive advertising. *See, e.g.*, *Sandoz Pharmaceuticals Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 228 (3d Cir. 1990); *Procter & Gamble Co. v. Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), *aff'd*, 747 F.2d 114 (2d Cir. 1984). And the Commission's expertise in deceptive advertising cases, Kraft's protestations notwithstanding, undoubtedly exceeds that of courts as a general matter. That false advertising cases constitute a small percentage of the FTC's overall workload does not negate the fact that significant resources are devoted to such cases in absolute terms, nor does it account for the institutional expertise the FTC gains through investigations, rulemakings, and consent orders. The Commissioners' personal experiences quite obviously affect their perceptions, but it does not follow that they are incapable of predicting whether a particular claim is likely to be perceived by a reasonable number of consumers.

2.

The crux of Kraft's first amendment argument is that the FTC's current subjective approach chills some truthful commercial speech. Kraft acknowledges the novelty of its argument, but asserts that the issue warrants consideration in light of evolving commercial speech doctrine. Once regarded as unprotected by the first amendment, *see Valentine v. Chrestensen*, 316 U.S. 52 (1942), commercial speech, as noted, has since been brought within the sphere of constitutional protection. *Virginia Pharmacy Bd.*, 425 U.S. at 770. Society has a strong interest "in the free flow of commercial information" critical to a free market economy, *id.* at 763, and it is this interest the first amendment vindicates in protecting commercial speech. *Brown & Williamson*, 778 F.2d at 43. However, "[f]alse, deceptive, or misleading advertising" does not serve that interest and thus this category of commercial speech "remains subject to restraint." *In re R.M.J.*, 455 U.S. 191, 200 (1982).

Kraft contends that by relying on its own subjective judgment that an ad, while literally true, implies a false message, the FTC chills nonmisleading, protected speech because advertisers are unable to predict whether the FTC will find a particular ad misleading. Advertisers can run sophisticated pre-dissemination consumer surveys and find no implied claims present, only to have the Commission determine in its own subjective view that consumers would perceive an implied claim. Indeed, Kraft maintains that is precisely what happened here. Even more troubling, Kraft maintains that the ads most vulnerable to this chilling effect are factual, comparative ads, like the Five Ounces of Milk campaign, of greatest benefit to consumers. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65 (noting that the "free flow" of comparative advertising is "indispensable" to intelligent consumer decisionmaking). The net result of the Commission's subjective approach will be an influx of soft "feel good" ads designed to avoid unpredictable FTC decisions. *See* Richard M. Schmidt, Jr. & Robert C. Burns, *Proof or Consequences: False Advertising and the Doctrine of Commercial Speech*, 56 U. Cin. L. Rev. 1273, 1293 (1988); Note, *The Risk of Chill: A Cost of the Standards Governing the Regulation of False Advertising Under Section 49(a) of the Lanham Act*, 77 Va. L. Rev. 339, 349 (1991). The way to avoid this chilling effect, according to Kraft, is to require the Commission to rely on objective indicia of consumer perceptions in finding implied claims.

Kraft's first amendment challenge is doomed by the Supreme Court's holding in *Zauderer*, which established that no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence. *See Zauderer*, 471 U.S. at 652-534; *accord American Home*, 695 F.2d at 688 n.10. In *Zauderer*, a lawyer advertised that clients who retained him on a contingent-fee basis would not have to pay *legal fees* if their lawsuits were unsuccessful, without disclosing that these clients would be charged for *costs*, even though these are terms of art unknown to most laypersons; thus, the ad implied that hiring this lawyer was a no-lose proposition to potential clients. The state sanctioned Zauderer for engaging in misleading advertising, and he challenged that sanction on first amendment grounds. In approving the state's action, the Supreme Court

declared, "When the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.'" *Zauderer*, 471 U.S. at 652-53 (quoting *Colgate-Palmolive*, 380 U.S. at 391-92).

Thus, *Zauderer* teaches that consumer surveys are not compelled by the first amendment when the alleged deception although implied, is conspicuous. In both *Zauderer* and here, an omitted piece of information -- the definition of a key contractual term in *Zauderer*, the effect of processing on nutrient content here -- led to potential consumer deception, and in both cases the ads were literally true, yet impliedly misleading. Kraft's implied claims were reasonably clear from the face of the ads and not unpredictable to Kraft. Our conclusion is strengthened by the fact that commercial speech is generally considered less susceptible to the chilling effect of regulation than other, more traditionally recognized forms of speech, such as political discourse. *See Bose*, 466 U.S. at 504 n.22 ("danger [minimal] that governmental regulation of false or misleading . . . product advertising will chill accurate and nondeceptive commercial expression"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). Because we conclude that the Commission was not required to rely on extrinsic evidence, we need not examine the extrinsic evidence proffered by Kraft that it says contravenes the Commission's findings. We note, however, that the Commission did thoroughly examine this evidence, albeit after the fact, and found that it did not refute the implied claim findings and that some of the evidence was based on unsound consumer testing methodologies.

Our holding does not diminish the force of Kraft's argument as a policy matter, and, indeed, the extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception. Along those lines, the Commission would be well-advised to adopt a consistent position on consumer survey methodology -- advertisers and the FTC, it appears, go round and round on this issue -- so that any uncertainty is reduced to an absolute minimum.

B.

Alternatively, Kraft argues that substantial evidence does not support the FTC's finding that the Class Picture ads convey a milk equivalency claim. (Recall that the FTC, unlike the ALJ, concluded that the Class Picture ads did not contain the imitation superiority claim, leaving only the milk equivalency finding on appeal.) Kraft claims that the Commission merely extrapolated its analysis from the Skimp ads to the Class Picture ads without considering significant differences between the two. The Commission stated, for example, that the Class Picture ads "contain copy elements substantially similar to the 'Skimp' ad elements that convey the impression of milk equivalency." *In re Kraft, Inc.*, FTC No. 9208, slip op. at 22. Kraft points out that the Class Picture ads contain only one of the four elements of the Skimp ads -- the reference to five ounces of milk juxtaposed with a reference to calcium content -- that contributed to the FTC's milk equivalence finding. And Kraft adds that the reference to five ounces of milk per slice and to calcium merely states that each slice has a large amount of calcium because of its milk content, a completely true inference. The ads do not state or imply that each slice actually *contains* five ounces of milk or its calcium equivalent. Indeed, Kraft asserts that no reasonable consumer could think that a 3/4 ounce of slice of cheese contains five ounces of milk.

We find substantial evidence in the record to support the FTC's finding. Although Kraft downplays the nexus in the ads between milk and calcium, the ads emphasize visually and verbally that five ounces of milk go into a slice of Kraft Singles; this image is linked to calcium content, strongly implying that the consumer gets the calcium found in five ounces of milk. The fact that the Commission listed four elements in finding an implied claim in the Skimp ads does not mean that those same elements must all be present in the Class Picture ad to reach that same conclusion. Furthermore, the Class Picture ads contained one other element reinforcing the milk equivalency claim, the phrase "5 oz. milk slice" inside the image of a glass superimposed on the Singles package, and it was reasonable for the Commission to conclude that there were important similarities between these two ads. Finally, to support its own interpretation of the ads, the Commission

examined available extrinsic evidence and this evidence, in the Commission's view, bolstered its findings.

Kraft asserts that the literal truth of the Class Picture ads -- they *are* made from five ounces of milk and they *do* have a high concentration of calcium -- makes it illogical to render a finding of consumer deception. The difficulty with this argument is that even literally true statements can have misleading implications. *See Zauderer*, 471 U.S. at 652; *see also Thompson Medical*, 791 F.2d at 197; *Removatron Int'l Corp.*, 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989); *American Home Prods.*, 695 F.2d at 687. Here, the average consumer is not likely to know that much of the calcium in five ounces of milk (30%) is lost in processing, which leaves consumers with a misleading impression about calcium content. The critical fact is not that reasonable consumers might believe that a 3/4 ounce slice of cheese actually contains five ounces of milk, but that reasonable consumers might believe that a 3/4 ounce slice actually contains the calcium in five ounces of milk.

C.

Kraft next asserts that the milk equivalency and imitation superiority claims, even if made, are not material to consumers. A claim is considered material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product." *Cliffdale Assocs.*, 103 F.T.C. at 165; FTC Policy Statement, 103 F.T.C. at 175, 182. The Commission is entitled to apply, within reason, a presumption of materiality, *Colgate-Palmolive*, 380 U.S. at 392, and it does so with three types of claims: (1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned. *Thompson Medical*, 104 F.T.C. at 816-17; *FTC Policy Statement*, 103 F.T.C. at 182-83. Absent one of these situations, the Commission examines the record and makes a finding of materiality or immateriality. *Id.*

Here, the ALJ concluded that both claims were presumptively material because calcium is a significant health concern to consumers. The Commission upheld this conclusion, although it

applied a presumption of materiality only to the imitation superiority claim. Kraft asserts the Commission's determination is not supported by substantial evidence. We disagree.

In determining that the milk equivalency claim was material to consumers, the FTC cited Kraft surveys showing that 71% of respondents rated calcium content an extremely or very important factor in their decision to buy Kraft Singles, and that 52% of female, and 40% of all respondents, reported significant personal concerns about adequate calcium consumption. The FTC further noted that the ads were targeted to female homemakers with children and that the 60 milligram difference between the calcium contained in five ounces of milk and that contained in a Kraft Single would make up for most of the RDA calcium deficiency shown in girls aged 9-11. Finally, the FTC found evidence in the record that Kraft designed the ads with the intent to capitalize on consumer calcium deficiency concerns.

Significantly, the FTC found further evidence of materiality in Kraft's conduct: despite repeated warnings, Kraft persisted in running the challenged ads. Before the ads even ran, ABC television raised a red flag when it asked Kraft to substantiate the milk and calcium claims in the ads. Kraft's ad agency also warned Kraft in a legal memorandum to substantiate the claims before running the ads. Moreover, in October 1985, a consumer group warned Kraft that it believed the Skimp ads were potentially deceptive. Nonetheless, a high-level Kraft executive recommended that the ad copy remain unaltered because the "Singles business is growing for the first time in four years due in large part to the copy." CX 63B; IDF 191. Finally, the FTC and the California Attorney General's Office independently notified the company in early 1986 that investigations had been initiated to determine whether the ads conveyed the milk equivalency claims. Notwithstanding these warnings, Kraft continued to run the ads and even rejected proposed alternatives that would have allayed concerns over their deceptive nature. From this, the FTC inferred -- we believe, reasonably -- that Kraft thought the challenged milk equivalency claim induced consumers to purchase Singles and hence that the claim was material to consumers. *See Cliffdale Associates*, 103 F.T.C. at 165; *FTC Policy Statement*, 103 F.T.C. at 175, 182.

With regard to the imitation superiority claim, the Commission applied a presumption of materiality after finding evidence that Kraft intended the challenged ads to convey this message. (Recall that intent to convey a claim is one of three categories qualifying for a presumption of materiality. *See, e.g., Thompson Medical*, 104 F.T.C. at 816-17.) It found this presumption buttressed by the fact that the challenged ad copy led to increased sales of Singles, even though they cost 40 percent more than imitation slices. Finally, the FTC determined that Kraft's consumer surveys were insufficient to rebut this inference and in particular criticized Kraft's consumer survey methodology because it offered limited response options to consumers.

Kraft asserts that neither materiality finding is supported by substantial evidence. It contends that the survey evidence on which the Commission relied shows only that calcium, not milk equivalency, is important to consumers. Materiality, Kraft maintains, turns on whether the claim *itself*, rather than the *subject matter* of the claim, affects consumer decision-making; accordingly, the Commission had to show that consumers would have acted differently with knowledge that Singles contain 70% rather than 100% of the calcium in five ounces of milk. See *FTC Policy Statement*, 103 F.T.C. at 175 (claim is material if it is "likely to affect the consumer's conduct or decision with regard to a product"). With the inquiry defined in this manner, the only relevant evidence on point -- a consumer survey showing that 1.7% of respondents would stop buying Singles if informed of the effect of processing on calcium content -- definitively disproves materiality. With regard to its conduct, Kraft argues it persisted in running the ads because it thought the ads *as a whole*, not the milk equivalency claim *per se*, contributed to increased sales and that, in any event, it responded to warnings by making a good faith attempt to modify the ads. Kraft repeats these arguments in attacking the FTC's finding that imitation superiority claim was material to consumers, claiming the evidence adduced showed only that Kraft intended to use the ads to differentiate Singles from imitation slices based on *milk* content, and not on *calcium* content, and that sales increased as a result of this general theme; inferring that the imitation superiority claim contributed to increased sales is pure conjecture.

Kraft's arguments lack merit. The FTC found solid evidence that consumers placed great importance on calcium consumption and from this reasonably inferred that a claim quantifying the calcium in Kraft Singles would be material to consumers. It rationally concluded that a 30% exaggeration of calcium content was a nutritionally significant claim that would affect consumer purchasing decisions. This finding was supported by expert witnesses who agreed that consumers would prefer a slice of cheese with 100% of the calcium in five ounces of milk over one with only 70%. *See* Tr. 1176-78 (Stewart); Tr. 3663-64 (Jacoby). Likewise, the materiality presumption applied to the imitation superiority claim was supported by substantial evidence. This finding rested on internal company documents showing that Kraft designed the ads to deliver an imitation superiority message. *See* CX 32B, 120, 122A, 4S. Although Kraft produced a study refuting this finding, the Commission discounted that study after finding its methodology flawed. Kraft concedes that the Skimp ads increased sales of Singles, but contends that the Commission cannot carry its burden of demonstrating a linkage between the ads and the imitation superiority claim *per se*. However, this increase in sales corresponded directly with the ad campaign and indisputably reversed that sagging sales and market share of Kraft Singles that had been attributed to competition from imitation slices. Moreover, Kraft's increase in market share came at a time when Singles were priced roughly 40% higher than imitation slices. Thus, the Commission reasonably inferred that the imitation superiority message, as a central theme in the ads, contributed to increased sales and market share.

IV.

The Commission's cease and desist order prohibits Kraft from running the Skimp and Class Picture ads, as well as from advertising any calcium or nutritional claims not supported by reliable scientific evidence. This order extends not only to the product contained in the deceptive advertisements (Kraft Singles), but to all Kraft cheeses and cheese-related products, which include Cracker Barrel, Velveeta, and Philadelphia Brand Cream Cheese. Kraft contends this order is too broad and must be set-aside or modified because it (1) bans constitutionally protected commercial

speech, and (2) is not rationally related to Kraft's violation of the Act.

A.

First amendment infirmities arise, according to Kraft, from the sweep of the order: by banning commercial speech that is only *potentially* misleading, the order chills some non-deceptive advertising deserving of constitutional protection. Kraft acknowledges that sweeping bans of this variety comport with traditional FTC practice, *see, e.g.*, *Cliffdale Assocs.*, 103 F.T.C. at 165, and have been repeatedly upheld against first amendment challenges in the past. *See Bristol-Myers Co.*, 738 F.2d at 562; *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1251 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *National Comm'n on Egg Nutrition*, 570 F.2d at 163; *American Home Prods.*, 695 F.2d at 688 n.10; *Sears Roebuck & Co. v. FTC*, 676 F.2d 385, 399-400 (9th Cir. 1982); *Litton Indus., Inc. v. FTC*, 676 F.2d 364, 373-74 (9th Cir. 1982); *Brown & Williamson Tobacco Corp.*, 778 F.2d at 40-41. It nonetheless again relies on the Supreme Court's recent decision in *Peel*, 496 U.S. 91 (plurality); *id.* at 111 (concurrence), in attacking the FTC's order.

Peel was sanctioned by the State of Illinois for advertising on his letterhead that he was a certified trial specialist, which violated a state regulation prohibiting lawyers from advertising any certifications or specialties. The Court first concluded that Peel's advertisement was only *potentially* misleading (some consumers might incorrectly assume that this was a state-sanctioned certification), not *inherently* misleading, *compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (door-to-door solicitation of legal services inherently misleading), and that only the latter can be categorically banned by the state. *Peel*, 469 U.S. at 108-110 & n.17 (plurality); *id.* at 111 (concurrence). Restrictions on potentially misleading speech, by contrast, can be no "broader than reasonably necessary to prevent the [deception]" and may not categorically prohibit such speech if less restrictive alternatives are available. *Id.* at 107-108 (citing *In re R.M.J.*, 455 U.S. at 203). Because such alternatives were available to Illinois (*e.g.*, a disclosure requirement), the Court held that this categorical ban violated the first amendment, *Peel*, 469 U.S. at 108-110 & n.17

(plurality); *id.* at 111-12 (concurrence), and added that the burden was on the state, not the advertiser, to come up with a less restrictive regulation. *Id.* at 109-11 (plurality) (state must draft a narrower regulation to correct potential consumer and Peel may continue using letterhead in the interim); *id.* at 117 (concurrence).

Kraft asserts that its advertisements are only potentially misleading, like the letterhead statement in *Peel*, because the milk equivalency and imitation superiority claims are true and verifiable, there is no evidence that these claims actually misled consumers, and the advertising medium is not inherently conducive to deception. Alternative remedial measures were readily available to the Commission, such as modifications to the ads or prominent disclosures, and thus, Kraft contends, the order is broader than reasonably necessary to prevent deception. Moreover, Kraft asserts the order put the onus on it to come up with nonmisleading alternatives in contravention of *Peel*.

We reject Kraft's argument. To begin with, the Commission determined that the ads were *actually* misleading, not *potentially* misleading, thus justifying a total ban on the challenged ads. *See Peel*, 469 U.S. at 100 ("[m]isleading advertising may be prohibited entirely"). Moreover, even if we were to assume the order bans some potentially misleading speech, it is only constitutionally defective if it is no "broader than reasonably necessary to prevent the [deception]." Id. at 107. We conclude that it is sufficiently narrow to pass constitutional muster. Unlike the prophylactic regulation in *Peel*, which banned an entire category of commercial speech, the restriction at issue here is an administrative cease and desist order directed toward one company's cheese ads and predicated on a specific finding of past deceptive practices.

To reiterate, the FTC's order does two things: it prohibits the Skimp ads and the Class Picture ads (as *currently* designed) and it requires Kraft to base future nutrient and calcium claims on reliable scientific evidence. Kraft mischaracterizes the decision as a categorical ban on commercial speech when in fact it identifies with particularity two nutrient claims that the Commission found actually misleading and prohibits only those claims. It further places on Kraft the (minor) burden of supporting future nutrient claims with

reliable data. This leaves Kraft free to use any advertisement it chooses, including the Skimp and Class Picture ads, so long as it either eliminates the elements specifically identified by the FTC as contributing to consumer deception or corrects this inaccurate impression by adding prominent, unambiguous disclosures. *See, e.g., Removatron*, 884 F.2d at 1497. We note one additional consideration further alleviating first amendment concerns; Kraft, like any party to an FTC order, may seek an advisory opinion from the Commission as to whether any future advertisements comply with its order, 16 C.F.R. § 2.41(d), and this procedure has been specifically cited by courts as one method of reducing advertiser uncertainty. *See Colgate-Palmolive*, 380 U.S. at 394; *Jay Norris*, 598 F.2d at 1251; *National Comm'n on Egg Nutrition*, 570 F.2d at 163; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1404 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976).

For these reasons, we hold that the specific prohibitions imposed on Kraft in the FTC's cease and desist order are not broader than reasonably necessary to prevent deception and hence not violative of the first amendment. We wish to reemphasize the limits of this order to assuage any fears Kraft might have about compliance. The *subject* of Kraft's ads (*i.e.*, the milk and calcium content of Singles) is obviously a perfectly legitimate subject of commercial advertising. It is only the *manner* of presentation that needs rectification. Kraft is free to continue advertising the milk and calcium content in its cheese products, and it can avoid future violations by correcting the misleading elements identified in the FTC's decision. Kraft could, for example, redesign the Skimp and Class Picture ads so that calcium content is accurately presented (*i.e.*, "each Kraft Single contains the calcium equivalent of 3.5 ounces of milk") or it could add prominent, unambiguous disclosures about calcium loss in processing, either of which would put it in full compliance with the order.

B.

Alternatively, Kraft argues that the scope of the order is not "reasonably related" to Kraft's violation of the Act because it extends to products that were not the subject of the challenged advertisements. The FTC has discretion to issue multi-product orders, so-called "fencing-in" orders, that extend beyond violations

of the Act to prevent violators from engaging in similar deceptive practices in the future. *Colgate-Palmolive*, 380 U.S. at 395; *Sears*, 676 F.2d at 391-92. Such an order must be sufficiently clear that it is comprehensible to the violator, and must be "reasonably relat[ed]" to a violation of the Act. *Colgate Palmolive*, 380 U.S. at 394-95. Kraft does not challenge the order's clarity or precision but only its reasonableness.

In determining whether a broad fencing-in order bears a "reasonable relationship" to a violation of the Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of transferability of the violation to other products, and (3) any history of prior violations. *Thompson Medical*, 104 F.T.C. at 883; *see also Sears*, 676 F.2d at 391-92. Here, the ALJ found that Kraft had not engaged in a long-term pattern of deceptive advertising, and that this was an isolated incident in response to significant competitive pressures on Kraft; hence, the ALJ opted for a narrow order. The FTC disagreed; it concluded that Kraft's violations were serious, deliberate, and easily transferable to other Kraft products, thus warranting a broad fencing-in order.

We find substantial evidence to support the scope of the order. The Commission based its finding of seriousness on the size ($15 million annually) and duration (two and one-half years) of the ad campaign and on the difficulty most consumers would face in judging the truth or falsity of the implied calcium claims. Although Kraft disputes the Commission's $15 million figure, arguing it covers many non-deceptive or unchallenged advertisements, that does not obviate the fact that this was an expensive, nationwide campaign with highly effective results. Moreover, the FTC properly found that it is unreasonable to expect most consumers to perform the calculations necessary to compare the calcium content of Kraft Singles with five ounces of milk given the fact that the nutrient information on milk cartons is not based on a five ounce serving.

As noted previously, the Commission also found that Kraft's conduct was deliberate because it persisted in running the challenged ad copy despite repeated warnings from outside sources that the copy might be implicitly misleading. *See Thompson*

Medical, 104 F.T.C. at 834-35. Kraft challenges this finding, arguing it responded to these warnings by acting in good faith to modify the ads, and further that it commissioned a post-dissemination survey to determine whether the complaints had any merit. This survey found that only an insignificant percentage of respondents detected the alleged claims. We reject these contentions. The deceptive claims were apparent from the face of the ad, but even if they somehow eluded Kraft, the Commission reasonably concluded that the steady stream of warnings should have put Kraft on notice that its surveys were somehow inadequate or defective. Kraft made three modifications to the ads, but two of them were implemented at the very end of the campaign, more than two years after it had begun. This dilatory response provided a sufficient basis for the Commission's conclusion.

The Commission further found that the violations were readily transferable to other Kraft cheese products given the general similarity between Singles and other Kraft cheeses. Kraft contends that the FTC cited no evidence to support this finding of transferability and therefore placed the burden on Kraft to show lack of transferability to other products in violation of the Administrative Procedure Act, 5 U.S.C. § 556(d), and the FTC's own regulations. 16 C.F.R. § 3.43(a); *see also Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33, 36 (2d Cir. 1975). We conclude that the FTC's finding of transferability was also reasonable. Kraft's other cheeses contain calcium and Kraft failed to provide any evidence to justify excepting these products from the order. This did not shift the burden to Kraft but merely recognized that counsel for the FTC presented a *prima facie* case for a fencing-in order and that Kraft failed to rebut this particular point.

Finally, the FTC concluded that these factors outweighed Kraft's lack of prior violations. Kraft maintains that the Commission simply brushed aside its clean record even though prior violations are highly probative of propensity to commit future violations. This contention is also without merit because it is the circumstances of the violation as a whole, and not merely the presence or absence of any one of factor, that justifies a broad order. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 304-05 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); *Sears, Roebuck & Co.*, 676 F.2d at 392. Hence, the FTC reasonably concluded

that the seriousness, deliberateness, and transferability of the violations took precedence over the absence of any prior Kraft violations.

V.

For the foregoing reasons, Kraft's petition to set-aside the order is DENIED and the Commission's order is ENFORCED.

MANION, *concurring*. While I concur with the opinion of the court, I am concerned that the FTC can avoid extrinsic evidence by simply concluding that a deceptive, implied claim is facially apparent. While the FTC has expertise, consumer surveys provide at least some objective determination of what the purchaser thinks and should be considered since, after all, the consumer is among those we are trying to protect.

Moreover, the FTC's current procedure threatens to chill nonmisleading, protected speech. Although not all commercial speech has constitutional protection, the law has developed since this court decided that the FTC could rely on its own interpretation of ads in *National Bakers Serv., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964), *Rhodes Pharmacal Co. v. FTC*, 208 F.2d 382, 387 (7th Cir. 1953), *rev'd in part* 348 U.S. 940 (1955), and *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (7th Cir. 1944). The Supreme Court has recognized that a free flow of information is indispensable to decisionmaking in the free enterprise system. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). But the FTC jeopardizes this flow by relying on the FTC commissioners' subjective interpretation to determine whether an ad, while literally true, implies a false message. Advertisers will be unable to predict whether the FTC will find particular ads misleading. Pre-dissemination surveys showing consumers *are not* misled will be useless since the FTC is free to ignore any such extrinsic evidence and rely on its subjective judgment that consumers *may* be misled. Advertisers unwilling to gamble with a multi-million dollar ad campaign have essentially two choices: (1) submit every campaign to the FTC in advance or (2) disseminate ads that say little or nothing about a product or service. An advertiser will not want to

risk producing comparative ads which the FTC may ultimately find to imply false, unintended messages.

In this case, the panel's opinion correctly concludes that *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) controls the extrinsic evidence issue. The Supreme Court did determine that consumer surveys are not compelled by the first amendment when the "possibility of deception is as self-evident as it is in [*Zauderer*]." *Id.* at 2282. In both this case and *Zauderer*, an omitted piece of information led to an implication which turned an ad that was literally true into a potentially deceiving ad. But it is important to note that neither this case nor *Zauderer* gives the FTC leave to ignore extrinsic evidence in every case.

Unfortunately, judicial groping for a distinction between cases where extrinsic evidence is necessary and those where it is not is leaving both advertisers and the FTC uncertain. All *Zauderer* tells them is that extrinsic evidence is not needed when the "possibility of deception is as self-evident as it is in [*Zauderer*]." *Id.* All this court tells them is that the FTC need not rely on such evidence if the "implied claims [are] reasonably clear from the face of the ads and not unpredictable." Op. at 17. Rather than leaving judges to hew the contours of this issue, the FTC would be well-advised to take this court's suggestion -- apply its expertise and develop a consumer survey methodology that advertisers can use to ascertain whether their ads contain implied, deceptive messages.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Janet D. Steiger, Chairman
Mary L. Azcuenaga
Andrew J. Strenio, Jr.
Deborah K. Owen
Roscoe B. Starek, III

In the Matter of	
KRAFT, INC., a corporation.	Docket No. 9208

FINAL ORDER

This matter has been heard by the Commission upon the appeals of respondent Kraft, Inc., and complaint counsel and upon briefs and oral argument in support of and in opposition to the appeals. For the reasons stated in the accompanying Opinion, the Commission has determined to affirm the Initial Decision of the Administrative Law Judge, except as otherwise noted, and enter the following Order. Accordingly,

I.

IT IS ORDERED that respondent Kraft, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of any product that is a cheese, related cheese product, imitation cheese, or substitute cheese, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product;

B. Misrepresenting in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product;

C. Representing in any manner, directly or by implication, the calcium content or amount, or the content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean, for purposes of this Order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results; or

D. Representing in any manner, directly or by implication, the comparative calcium content or amount, or the comparative content or amount of any other nutrient of any such product, unless at the time of making such representation respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. "Competent and reliable scientific evidence" shall mean, for purposes of this Order, those tests, analyses, research, studies or other evidence conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results.

II.

IT IS FURTHER ORDERED that for three (3) years after the last date of dissemination of any representation concerning any product specified in Part I of this Order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying copies of:

1. All materials that were relied upon by respondent in disseminating such representation; and

2. All test reports, studies, surveys, demonstrations or other evidence in its possession or control that contradict, qualify, or call into question such representation.

III.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising under this Order.

IV.

IT IS FURTHER ORDERED that respondent shall, within thirty (30) days after this Order becomes final, distribute a copy of this Order to each of its operating divisions, and to all distributors of any product manufactured or marketed by respondent that is specified in Part I of this Order.

V.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after this Order becomes final, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

By the Commission, Commissioner Starek not participating.

Donald S. Clark/s
Donald S. Clark
Secretary

SEAL

ISSUED: January 30, 1991

ATTACHMENT:

Opinion of the Commission

BO92154

D. 9208

OPINION OF THE COMMISSION

By Owen, Commissioner:

I. INTRODUCTION

Respondent Kraft, Inc. ("Kraft") is one of the largest food products companies in the United States. Kraft produces and markets a broad line of cheese and dairy products under various brand names. One such product is Kraft Singles American Pasteurized Process Cheese Food ("Kraft Singles"), which consists of individual cellophane-wrapped slices of pasteurized process cheese food sold in various count packages. Kraft is charged with violating Sections 5 and 12 of the Federal Trade Commission Act by materially misrepresenting the calcium content and relative calcium benefit of Kraft Singles in a series of nationally disseminated broadcast and print advertisements that ran from early 1985 through mid-1987.[1]

The challenged advertisements are known as the "Skimp" and the "Class Picture/5 ounce" (or "Class Picture/II") ads, which were developed as part of Kraft's overall "Five Ounces of Milk" advertising campaign. The "Five Ounces of Milk" strategy was developed in 1983 by Kraft and its advertising agency, J. Walter Thompson, to respond to Kraft Singles' market share loss to the

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[1] References to the record are abbreviated as follows:

IDF	-initial decision finding
ID	-initial decision
Tr.	-transcript of testimony
CX	-complaint counsel's exhibit
RX	-respondent's exhibit
RAB	-respondent's appeal brief
CAB	-complaint counsel's answering and cross-appeal brief
RRAB	-respondent's reply and answering brief
CRB	-complaint counsel's reply brief

increasing number of lower cost non-dairy imitation and substitute slices that were appearing on the market. The latter were advertised as being both less expensive and more nutritious than dairy slices such as Kraft Singles.[2] IDF 14-18; CX 3, CX 44F. Most advertisements in the "Five Ounces of Milk" campaign focused on the theme that a slice of Kraft Singles has five ounces of milk as an ingredient, while imitation slices use very little milk, or are made predominantly from vegetable oil and water. *See* IDF 19, 21, 26; CX 276. One purpose of the campaign was to educate

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[2] Some background on the products involved is helpful to understanding the issues in this case. Pasteurized process cheese foods, such as Kraft Singles, are subject to a Food and Drug Administration ("FDA") definition and standard of identity that requires a certain minimum level of mandatory ingredients, and permits specified optional ingredients. 21 C.F.R. § 133.173. FDA regulations require that pasteurized process cheese food contain at least 51 percent natural cheese. 21 C.F.R. § 133.173(a)(5). A slice of Kraft Singles contains about 67 to 68 percent natural cheese. IDF 6. Imitation slices can be any combination of ingredients that resembles and can be substituted for pasteurized process cheese food, but they must be labelled "imitation." *Id.* Typically, imitation slices are a combination of water, vegetable oil, flavoring agents and fortifying ingredients. IDF 8. Imitation slices and substitute slices also compete in the individually wrapped process slices category. IDF 7. Imitation slices are, by FDA definition, "nutritionally inferior" to pasteurized process cheese food slices like Kraft Singles even though they may contain more of certain nutrients than their natural counterparts. IDF 9, 216, 218. "Nutritional inferiority" is defined by the FDA as any reduction in the content of any "essential ingredient" that is present in a measurable amount in the food being imitated. 21 C.F.R. § 101.3(e)(4). Substitute slices are cheese slices that do not meet the FDA standard of identity for pasteurized process cheese food slices, but are not "nutritionally inferior" to those slices, and so are not required under federal law to be labelled "imitation." 21 C.F.R. § 101.3(e)(2). Although the complaint refers only to "imitation slices," we interpret this phrase to refer to both imitation and substitute cheese slices. *See* IDF 219.

consumers about the difference in milk content between Kraft Singles and non-dairy slices because Kraft believed that consumers were unaware that the price differential between these products was attributable to differences in ingredient costs. IDF 18.

The "Skimp" ads ran nationally from February 1985 through June 1987, and featured the message that Kraft Singles have five ounces of milk per slice, while imitation slices use "hardly any milk." *See* IDF 23; CX 276. The "Skimp" ads differed from previous executions in the "Five Ounces of Milk" campaign in that they were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to calcium in the ad copy as the key nutritional element. IDF 23-37, 87; *see* CX 276C. Calcium was identified as an example of the nutritional benefit provided by Kraft Singles in order to capitalize on high consumer interest in calcium at the time, and to respond to the increasing number of products, including competing slices, that were being advertised as good sources of calcium. IDF 27.

The "Class Picture/5 ounce" television ads ran nationally from June 1986 through January 1987. IDF 40; see CX 276F. They reflected a different creative strategy than the "Skimp" ads, and were intended to communicate that Kraft Singles are an "excellent source of calcium." IDF 38; *see* IDF 39. Although the "Class Picture/5 ounce" ads stated that Kraft Singles are made from five ounces of milk per slice so they are "concentrated with calcium," these ads are not expressly comparative in that they do not mention imitation or substitute slices. IDF 38.

On June 17, 1987, the Commission issued a complaint alleging that the aforementioned advertisements materially represented, directly or by implication: (1) that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk (the "milk equivalency" claim; Complaint ¶ 6), and (2) that Kraft Singles contain more calcium than do most imitation cheese slices (the "imitation superiority" claim; Complaint ¶8). The complaint alleges that neither of these calcium claims is in fact true (Complaint ¶¶ 7, 9), and further alleges that Kraft represented in its advertisements that it possessed and relied upon a reasonable basis for the challenged representations, when it did not (Complaint ¶¶ 10, 11). The complaint charges that these representations were thus

false and misleading in violation of Sections 5 and 12 of the Federal Trade Commission Act. The matter was assigned to Administrative Law Judge Lewis F. Parker for hearing. The trial began on July 5, 1988, and ended on November 17, 1988. The record closed on November 29, 1988. The parties filed their proposed findings of fact and conclusions of law on January 10, 1989, and their answers on February 10, 1989. The initial decision and order of the ALJ were filed on April 3, 1989.

The ALJ found Kraft liable for making both of the alleged calcium claims in each of the challenged ad series. ID at 64-65, 69. He found that the claims were material because they involved important health concerns. ID at 70-71. He also found that the claims were objective product claims, and that they were false and unsubstantiated. ID at 69-70. The ALJ's order adopts the relief proposed by complaint counsel in the Notice Order attached to the Commission's complaint, with the exception of the scope of product coverage. He concluded that Kraft did not intend to make the misrepresentations, that there was insufficient evidence of a persistent, long-term pattern of deceptive advertising, and that the order proposed by complaint counsel would expose Kraft to liability in the future for "unpredictable interpretations of its ads." ID at 71-72. Accordingly, he rejected the scope of product coverage proposed in the Notice Order, which would have included "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese," and limited his order to "individually wrapped slices of pasteurized process, imitation or substitute cheese products." ID at 72.

Kraft appeals from the ALJ's initial decision and order. Kraft's principal arguments on appeal are that: (1) neither the ALJ nor, by implication, the Commission can find the alleged implied claims in this case based only on review and analysis of the challenged ads, but must rely on extrinsic evidence; (2) the ALJ erred in finding that, based on the extrinsic evidence in the record, consumers would take the alleged implications from the challenged ads; 3) the ALJ erred in concluding that the alleged calcium claims would have been material to consumers; and (4) the entry of any order based on the ALJ's underlying liability findings would prevent Kraft from engaging in truthful informative advertising for covered products, and would thus be an unconstitutional restraint

on commercial speech. Complaint counsel appeals the narrow scope of product coverage of the ALJ's order.

We affirm liability under Sections 5 and 12 of the FTC Act,[3] although we differ with the initial decision in certain respects, as discussed in this opinion. In particular, we agree that the milk equivalency claim is conveyed by both the "Skimp" ads and the "Class Picture/5 ounce" ads, but we conclude that the imitation superiority claim is conveyed only by the "Skimp" ads. We generally agree with the ALJ's findings and conclusions to the extent they are consistent with those set forth in this opinion, and, except as noted herein, adopt them as our own. Based on our consideration of the record in this case and the arguments of counsel for both parties, we grant complaint counsel's appeal. The order we adopt inciudes the broader provision for product coverage as set forth in the Notice Order.

Kraft does not appeal the ALJ's findings that the alleged calcium claims are false and unsubstantiated if they are in fact made in the challenged ads. Accordingly, we adopt the ALJ's findings and conclusions on this issue. IDF 211-280; ID at 69-70. Thus, with respect to the milk equivalency claim, we find that a 3/4-ounce slice of Kraft Singles has 70 percent, not 100 percent, of the calcium of five ounces of whole milk, by Kraft's own analysis and admission.[4] With respect to the imitation superiority claim, we

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[3] 15 U.S.C. §§ 45 & 52. Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 prohibits false advertising likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 of the Act defines false advertising for purposes of Section 12 as advertising that is misleading in a material respect. 15 U.S.C. § 55. If an act or practice violates Section 12, it also violates Section 5. 15 U.S.C. § 52(b).

[4] The calcium in Kraft Singles is derived from three dairy sources: natural cheese, whey, and skim milk, with the largest percentage of calcium coming from the natural cheese component. IDF 7. Even though it takes five ounces of milk to make the natural cheese contained in a 3/4-ounce slice of Kraft Singles, that slice contains

(continued...)

find that Kraft Singles contain, on average, 15 percent of the U.S. Recommended Daily Allowance ("RDA") of calcium per ounce,[5] and that the vast majority of imitation slices sold in the United States during the relevant time period also contained 15 percent or more of the U.S. RDA of calcium per ounce.[6] IDF 224, 234-35.

Our analysis of the issues on appeal is presented below.

II. WERE THE CLAIMS MADE?

A. Legal Framework

The Commission will deem an advertisement to convey a claim if consumers, acting reasonably under the circumstances, would interpret the advertisement to contain that message.[7] *Thompson*

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[4] (...continued)
less than the amount of nutrients found in five ounces of milk due to whey losses associated with cheesemaking and the dilution effect of other ingredients added to the cheese food. Answer ¶ 7; CX 100; *see also* IDF 12, 211, 212.

[5] The U.S. RDA for calcium is 1 gram, or 1000 milligrams ("mg."). *See* 21 C.F.R. § 101.9(c)(7)(iv); Recker Tr. 597-98.

[6] Respondent did not substantiate the assertion that Kraft Singles contain more calcium than most imitation slices. However, respondent presented evidence at trial suggesting that the dairy calcium in Kraft Singles is more beneficial to the body due to the greater "bioavailability" (*i.e.*, the amount absorbed from the gastrointestinal tract into the bloodstream) of dairy calcium relative to the non-dairy calcium in imitation slices. IDF 237-278. The ALJ found that the evidence Kraft presented in support of its bioavailability claim was not convincing. IDF 279. We agree.

[7] This standard is intended to ensure that the flow of useful and accurate product information conveyed to consumers through advertising is not deterred. *See Thompson Medical Co.*, 104 F.T.C. 648, 788 (1984). We note, for example, that a study conducted by the Commission's Bureau of Economics on producer
(continued...)

Medical Co., 104 F.T.C. 648, 788 (1984), *aff'd*, 791 F. 2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-66 (1984); Federal Trade Commission Policy Statement on Deception, *appended to Cliffdale Associates, Inc.*, 103 F.T.C. 176-77 (1984) [hereinafter "*Deception Statement*"]. For analytic purposes, the Commission often distinguishes between express claims and implied claims in evaluating what messages an ad can reasonably be interpreted as containing. Express claims directly state the representation at issue. *Thompson Medical*, 104 F.T.C. at 788. Implied claims are any claims that are not express. They range on a continuum from claims that would be "virtually synonymous with an express claim through language that literally says one thing but strongly suggests another to language which relatively few consumers would interpret as making a particular representation." *Id.* at 789.[8] Both express

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[7] (...continued)
advertising of the health benefits of fiber consumption in the ready-to-eat cereal market indicates that such advertising was a particularly effective source of important health information to segments of the population not previously reached by government and general information sources. *See* P. Ippolito & A. Mathios, *Health Claims in Advertising and Labeling: A Study of the Cereal Market*, Bureau of Economics Staff Report, Federal Trade Commission (August 1989).

[8] Advertisements do not necessarily convey one message to all persons, and the same advertising elements may be amenable to more than one reasonable interpretation. Each interpretation is reasonable as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed. *Thompson Medical*, 104 F.T.C. at 789 n.7. An advertisement that reasonably can be interpreted in a misleading way is deceptive, even though other, non-misleading interpretations may be equally possible. *Id.* at 789 n.7, 818; *Bristol-Myers Co.*, 102 F.T.C. 21, 320 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Advertisements may also contain a secondary message that tends to support or re-enforce the
(continued...)

claims and implied claims can be deceptive. *See, e.g., Removatron International Corp.*, 111 F.T.C. 206, 292-95 (1988), *aff'd*, 884 F.2d 1489 (1st Cir. 1989).

Advertisers can be liable for misleading consumers by innuendo as well as by outright false statements. *See Deception Statement*, 103 F.T.C. at 175 n. 4, 176-77; *Cliffdale*, 103 F.T.C. at 170-71; *Fedders Corp. v. FTC*, 529 F.2d 1398, 1402-03 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Evidence of intent to deceive is not required to find liability. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977).

The primary evidence of what claims an advertisement can convey to reasonable consumers consists of the advertisement itself. While express claims are necessarily self-evident from the ad, implied claims may or may not be apparent. *See Deception Statement*, 103 F.T.C. at 176. We are often able to conclude that an advertisement contains an implied claim by evaluating the content of the ad and the circumstances surrounding it. *Thompson Medical*, 104 F.T.C. at 789, 799; *Cliffdale*, 103 F.T.C. at 164; *Deception Statement*, 103 F.T.C. at 176. This technique is primarily useful in evaluating advertisements whose language or depictions are clear enough to permit us to conclude with confidence, after examining the interaction of all the constituent elements, that they convey a particular implied claim to consumers acting reasonably under the circumstances. *Thompson Medical*, 104 F.T.C. at 789.

If, based on our initial review of the evidence from the advertisement itself, we cannot conclude with confidence that an advertisement can reasonably be read to contain a particular implied message, we will not find the ad to have made the claim unless extrinsic evidence allows us to conclude that such a reading of the ad is reasonable. *Thompson Medical*, 104 F.T.C. at 789; *Bristol-*

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[8] (...continued)
primary message. The secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Deception Statement*, 103 F.T.C. at 178 n.21.

Myers Co., 102 F.T.C. 21, 319 (1983), *aff'd*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985). Such evidence can include reliable results from methodologically sound consumer surveys. *Thompson Medical*, 104 F.T.C. at 790. The Commission might also consider evidence respecting the common usage of terms, as well as generally accepted principles drawn from market research showing that consumers generally respond in a certain manner to advertisements that are presented in a particular way. *Id.* The Commission can also consider the opinions of expert witnesses in the proceeding as to how an advertisement might reasonably be interpreted, if such opinions are adequately supported. *Id.* at 790 & n.11.

In all instances, the Commission will carefully consider any extrinsic evidence that is introduced, taking into account the quality and reliability of the evidence. *Deception Statement*, 103 F.T.C. at 176. Whether looking at evidence from the ad itself, extrinsic evidence, or both, the Commission considers the overall, net impression made by the advertisement in determining what messages may reasonably be ascribed to it. *Thompson Medical*, 104 F.T.C. at 790. An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *Deception Statement*, 103 F.T.C. at 177 n.20.

B. The Claims

The challenged "Skimp" and "Class Picture/5 ounce" ads do not expressly state the alleged calcium claims, but complaint counsel argue that the ads can reasonably be interpreted as conveying the claims by implication. Kraft denies that its ads make either of the representations specified in the complaint. We examine each of the alleged claims to determine whether consumers acting reasonably under the circumstances would interpret the challenged ads to have made the alleged claims.

1. Milk Equivalency Claim

a. The "Skimp" Ads

The following is characteristic ad copy taken from a television commercial version of a "Skimp" ad:[9]

> *Lady (voice over)*: I admit it. I thought of skimping. Could you look into those big blue eyes and skimp on her?
> So I buy KRAFT Singles.
> Imitation slices use hardly any milk.
> But KRAFT has five ounces per slice.
> Five ounces. So her little bones get calcium they need to grow.
> No, she doesn't know what that big KRAFT means.
> Good thing I do.
>
> *Singers*: KRAFT Singles. More milk makes 'em ... more milk makes 'em good.
>
> *Lady (voice over)*: Skimp on her? No way.

See CX 62 C & Z-72 (television ad); CX 62 Z-33 (print ad) (reproduced in Appendix A hereto); *see also* Complaint ¶ 5 and Exhibits A-D; IDF 26, 44. The visual portion corresponding to the statement "imitation slices use hardly any milk" shows a small amount of milk being poured into the bottom of a glass. The audio continues, "but Kraft has five ounces per slice. Five ounces. So her little bones get calcium they need to grow." Simultaneously, milk continues to pour into the glass, filling it up to the five ounce mark. The commercial also shows milk pouring into a glass which then animates back onto a package of Kraft Singles, the front label of which displays the phrase "5 oz. milk slice" inside the image of a glass. CX 95.

In January 1986, Kraft ran a revised version of the "Skimp" ads which changed "Kraft has five ounces per slice" to "Kraft is made from five ounces per slice." IDF 28; *see* CX 276F, CX 106. In July 1986, J. Walter Thompson developed several additional

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[9] Each television and print execution was somewhat different, and most were disseminated with a number of variations.

copy alternatives, which Kraft declined to adopt at that time. IDF 89. In March 1987, near the end of the "Skimp" campaign, Kraft made a further change to the text of the ads, adding the disclosure "one 3/4 ounce slice has 70% of the calcium of five oz. of milk" as a superscript in the television commercials and as a footnote in the print ads.[10] IDF 28; CX 276I; *see also* CX 275B.

The ALJ found that the reference in the "Skimp" ad copy to the precise amount of milk in a Kraft Single, together with the reference to calcium, can be interpreted as implying that a slice of Kraft Singles contains the same amount of calcium as five ounces of milk; because there is no mention that calcium is in fact lost in the processing of cheese, the "Skimp" ads convey the milk equivalency claim. IDF 45. He concluded that reasonable consumers would take the net impression of milk equivalency from the language used and its interaction with the various elements in the challenged ads. ID at 63-64. Finally, he found that most of the ads did not try to dispel the impression of milk equivalency, and that the few later ads that contained altered copy ("has" rather than "is made from") or added a disclaimer ("one 3/4 ounce slice has 70% of the calcium of five ounces of milk") were ineffective due to the confusing and inconspicuous nature of these modifications. ID at 64; *see* IDF 57-58, 133.

We agree that each ad in the "Skimp" series, viewed as a whole, conveys an overall net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. Several elements reinforce this impression. The word "has," and the repetition of the precise amount of milk in a Kraft Single -- five ounces -- followed by express reference to a specific nutrient -- calcium -- linked by the causal word "so," suggest that a slice of Kraft Singles contains as much calcium as the five ounces of milk from which it is made. The visual image of milk being poured into a glass up to a five-ounce mark, which is then superimposed onto

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[10] Respondent also claims that a third change was made to the "Skimp" ad copy, *i.e.*, the phrase "so her little bones get calcium" was allegedly changed to "plus her little bones get calcium." *See* RAB at 16 n.14. There is, however, very little record evidence pertaining to this change.

a package of Kraft Singles, further reinforces the linkage between the specific amount of milk ingredient in the product and the product's calcium value, which is mentioned in the audio portion of the television advertisement and in the print ad copy. We agree that no element in the ads successfully dispels this impression.

We also find that the later-added copy modifications and disclosures were ineffective to dispel the net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. For example, the superimposed caption in the television commercials appears briefly in a middle frame in conjunction with another caption ("milk amounts based on cheese content"), and conveys a complicated quantitative message ("one 3/4 ounce slice has 70% of the calcium of five ounces of milk"). Generally recognized marketing principles suggest that, given the distracting visual and audio elements and the brief appearance of the complex superscript in the middle of the commercial, it is unlikely that the visual disclosure is effective as a corrective measure. *See Thompson Medical*, 104 F.T.C. at 797-98 & n. 22; *Deception Statement*, 103 F.T.C. at 180. We conclude, based on our review of the television and print versions of the "Skimp" ads themselves, that they contain elements that are likely to cause reasonable consumers to interpret the ads as claiming that Kraft Singles contain the same amount of calcium as five ounces of milk.

Respondent asserts that the implied claims at issue in this case involve "language which relatively few consumers would interpret as making" the claims at issue, in contrast with the implied claims at issue in *Thompson Medical* and *Removatron*, which were "virtually synonymous" with express claims, and where it was "entirely appropriate to find from a mere reading of the ad copy that consumers were likely to take away those implications." RAB at 19-20. Although Respondent attempts to contrast the Kraft ads with those at issue in *Thompson Medical* and *Removatron*, we view the relevant ads as more comparable than contrasting in that they all contain facially evident elements that indicate the existence of implied claims. For example, in the "Aspercreme" ads, the visual image of two aspirin being replaced by a tube of Aspercreme is similar to the visual technique used in Kraft's "Skimp" ads in which a glass is shown filling to the five-ounce mark with milk. As reinforced by these visual images, the textual passages in the two

advertising campaigns (*e.g.*, "Kraft has five ounces . . . so her little bones get calcium" and "with amazing Aspercreme, you can get the strong relief of aspirin"), place both ads in a very similar position; that is, they both contain implied claims that are close to express.

In addition, the implied effect of some of the statements in the "Skimp" ads were similar to the effect of some of the ads in *Removatron*. Advertisements for the Removatron device stated that it "works toward dehydrating and destroying the papilla, which is the source of nourishment for the hair" and that "further hair growth is prevented." The natural implication from this statement -- that destroying the papilla prevents further hair growth -- is that the hair won't grow back. Similarly, when the Kraft "Skimp" ads proclaimed that a slice of Kraft Singles *has* or *is made from* five ounces of milk "*so* her little bones get calcium" (emphasis added), the causal link of the phrases naturally implied that a Kraft Single has the same amount of calcium as five ounces of milk.

Because we find the evidence from the ads themselves to be sufficiently clear, we find it unnecessary in this case to resort to extrinsic evidence in order to conclude that the milk equivalency claim is made by the "Skimp" ads.[11] We reject Kraft's argument

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[11] Respondent claims that the testimony of six of its witnesses and two of complaint counsel's experts supports the contention that consumer survey evidence is required in this case to determine whether consumers are likely to take the alleged implied calcium claims from the challenged ads. RAE at 20 & n.18. We read the testimony cited by Kraft to say that, as a general matter of methodology, reliable consumer survey evidence is the preferred means of confirming what messages consumers actually take from advertisements and quantifying the degree to which those messages are communicated. We do not find that this testimony establishes that the claims in this case can only be found through consumer surveys, or that no reasonable interpretation of the ads can be made based on evidence from the ads themselves. Where we cannot conclude that an advertisement contains a particular implied message based on our review of evidence from the ad itself, we will give great weight to reliable consumer survey evidence.

(continued...)

that the Commission cannot, as a matter of law, find the implied claims in this case based on evidence from the challenged ads themselves, but must rely of extrinsic evidence."[12] RAB at 3, 5-6, 19-21; RRAB at 7-13. It is well settled that the Commission can determine whether a claim is made in an advertisement without resorting to extrinsic evidence even if the claim is implied. *Removatron*, 111 F.T.C. at 291-96; *Thompson Medical*, 104 F.T.C. at 789; *Cliffdale*, 103 F.T.C. at 166; *Bristol-Myers Co.*, 102 F.T.C. 21, 319 (1983). *See also American Home Products Corp. v. FTC*, 695 F.2d 681, 687 & n.10 (3d Cir. 1982); *Carter Products, Inc. v. FTC*, 323 F.2d 523, 528 (5th Cir. 1963). Nor do we agree with Kraft that the First Amendment mandates that the Commission rely on consumer survey evidence to find an implied claim that we find evident from elements on the face of the ad itself. RAB at 3, 5-6, 19-21; RRAB at 7-13. In discussing the extent of constitutional protection accorded commercial speech, the Supreme Court clearly has stated that:

> [w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to "conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead."

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-53 (1985), quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965).

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[11] (...continued)
Thompson Medical, 104 F.T.C. at 789-90. In this case, we disagree with respondent's overly rigid reading of the challenged ad copy, and find that we do not need extrinsic evidence given the combination of misleading elements clearly present on the face of the ads.

[12] At oral argument, counsel for Kraft appeared to concede that it is the Commission's province to determine whether the existence of the implied claims at issue is subject to interpretation based on evidence from the ads themselves. 12/7/89 Transcript of Oral Argument at 27-30.

We conclude that our review of the evidence from the "Skimp" ads themselves is sufficient to establish that they contain the milk equivalency message. However, because extrinsic evidence has also been offered on this issue, we also considered that evidence. We find that the weight of the probative extrinsic evidence is consistent with our determination that the "Skimp" ads convey the milk equivalency claim to at least some groups of reasonable consumers.[13]

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[13] This evidence includes, but is not limited to, the results of the Market Opinion Research ("MOR") consumer survey (CX 196), which measured consumer reaction to three challenged "Skimp" ads (two television ads and one print ad), and which, after taking into account control group responses, indicate that between 45 percent and 53 percent of survey respondents took the milk equivalency message from the ads in response to closed-ended questions. IDF 99-171; ID 69; *see* IDF 48-52. The evidence also includes the opinion of complaint counsel's expert Dr. David Stewart, who designed and testified about the MOR survey, and whose testimony, in our view, was adequately supported. *See* IDF 48, 71; *see also* Stewart Tr. 1081-82. Although we agree with respondent that the design of the MOR survey questionnaire is not without flaws, and that alternative or additional means could have been used to better minimize the potential for yea-saying bias inherent in using a closed-ended question format, on balance, we find the MOR survey results to be of some probative value.

We have also considered the extrinsic evidence cited by respondent to support a finding that the alleged claims were not made in the ads. *See* RAB at 49-56; RRAB at 49-55. The consumer survey evidence consists of: (1) results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 7; CX 79), and for purposes of this proceeding by Opinion Research Corporation (RX 47); and (2) analyses of the verbatim responses to the MOR survey's open-ended questions by Kraft's experts, Dr. James Heisler and Dr. Leon Kaplan (RX 83; RX 85). *See* RAB at 49 n. 41; *see also* IDF 73-78, 80, 169-172, 175-185. The ASI copy test results relied upon by Kraft in this proceeding derive from a survey methodology

(continued...)

b. The "Class Picture/5 ounce" Ads

The "Class Picture/5 ounce" ads were not part of the earlier "Skimp" campaign, and were executed somewhat differently. The

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[13] (...continued)
designed primarily to measure ad memorability, and not ad communication. As a result, we find that the ASI survey questions did not fully probe for all of the messages, including secondary messages, conveyed by the ads to survey participants. *See* IDF 185. With respect to the survey conducted by Opinion Research Corporation ("ORC"), we again find that the survey questions yielding the results upon which respondent relies were not sufficiently directed to compensate for normal variations in consumers' ability to recall and articulate their impressions on viewing the test ads, and thus did not fully elicit the messages, including secondary messages, received. The ORC results may thus understate the number of survey participants that received the challenged claims from the test ads. *See* IDF 183, 184. We have also considered, but are not persuaded by, the testimony, including expert testimony, cited by Kraft in support of the proposition that the open-ended questions used in the consumer surveys in question did elicit all of the messages taken by consumers. *See* RRAB at 47 n.43, 50 n.46, 51-52 & n.48, 53, 55; *see also* RAB at 54-55. Although there may well be instances where the only reliable extrinsic evidence consists of responses to open-ended questions, that is not the case here. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our reading of the "Skimp" ads. *See Thompson Medical*, 104 F.T.C. at 805 (while results from unaided recall questions supported respondent's position, results from aided recall questions "tell an entirely different story").

We disagree that our conclusion regarding the survey evidence relied upon by respondent in this case creates "intolerable uncertainty for advertisers" who use this form of copy testing in the ordinary course of business. RAB at 56. The quality of any consumer research offered as evidence will be evaluated in the totality of the circumstances, including whether the advertiser was alerted to potentially misleading messages in its ads. *See Thompson Medical*, 104 F.T.C. at 835-36; discussion *infra* at Part V.

visual elements depict a group of school children having their group picture taken. The following is characteristic ad copy taken from the television commercial version of these ads:

> *Announcer (voice over)*: Can you see what's missing in this picture?
>
> Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important. KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.
>
> *Photographer*: Say Cheese!
> *Kids*: Cheese!
> *Announcer (voice over)*: Say KRAFT Singles.
> 'Cause kids love KRAFT Singles, right down to their bones.

See CX 275I & CX 62 Z-11 (television ad); CX 62 Z-55 (print ad) (reproduced in Appendix B hereto); *see also* IDF 38. The "Class Picture/5 ounce" ads were disseminated with a superscript that states: "[o]ne 3/4 ounce slice has 70% of the calcium of five ounces of milk." *Id.*; *see also* CX 62 Z-12, Z-13; CX 276F-G; CX 277D.

According to the ALJ, the copy elements that prompted his finding of the milk equivalency claim in the "Skimp" ads were also present in the "Class Picture/5 ounce" ads. ID at 63; *see* IDF 57, 59-60, 134, 165. He concluded that ads containing those elements were likely to give reasonable consumers the net impression of milk equivalency, and that the superscript disclosure was ineffective to correct this net impression. ID at 64. We agree that the "Class Picture/5 ounce" ads contain copy elements substantially similar to the "Skimp" ad elements that convey the impression of milk equivalence. Those elements include juxtaposition of the reference to the five ounces of milk used to make Kraft Singles with the statement "so they're concentrated with calcium," a linkage that is reinforced by subsequent repetition of the reference to calcium. We also find, for the reasons discussed above in connection with the "Skimp" ads, that the superscript disclaimer does not effectively

correct the ad's overall impression. Considering all elements, we conclude that the "Class Picture/5 ounce" ads convey a net impression that Kraft Singles contain the same amount of calcium as five ounces of milk. While this conclusion can he supported by evidence from the ads themselves, we also find that this conclusion is consistent with the weight of the probative extrinsic evidence in the record, including inferences reasonably drawn from the same evidence that supports such a conclusion with respect to the "Skimp" ads.[14]

2. Imitation Superiority Claim

a. The "Skimp" Ads

In examining the "Skimp" ads with respect to the imitation superiority claim, the ALJ considered such characteristic ad copy language as:

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[14] *See* note 13, *supra*; IDF 134, 165. We have also considered the extrinsic evidence cited by respondent as showing that the "Class Picture/5 ounce" ads did not convey the milk equivalency claim. *See* RAB at 49 n.41, 54, 58-59; RRAB at 47 & n.43, 49, 51-52 & n.48. The consumer survey evidence consists of results from copy tests conducted for Kraft in the ordinary course of business by ASI Market Research (RX 8, RX 128; *see* IDF 73, 81, 172), and by Communication Workshop Incorporated ("CWI") (RX 9, RX 128; *see* IDF 73, 82-85, 173-74). Our conclusions with respect to the ASI survey results and the testimony cited by Kraft are discussed above at note 13. With respect to the survey conducted by CWI, we conclude that the survey questions yielding the results relied upon by Kraft in this proceeding did not probe survey participants sufficiently, under conditions calculated to correct for bias, to provide a reliable measure of the messages, including secondary messages, received by reasonable consumers. *See* IDF 185. We therefore find the extrinsic evidence cited by Kraft to be insufficiently probative to outweigh the record evidence that is consistent with our interpretation of the "Class Picture/5 ounce" ads.

> Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

He also considered the visual elements in the ad that reinforced the ad copy message. The ALJ concluded that reasonable consumers would take away the net impression that Kraft Singles are superior to imitation slices because they have five ounces of milk and the equivalent amount of calcium, whereas imitation slices (which, according to the ad, use hardly any milk) have less calcium. ID 64; IDF 44, 47.

We agree. The imitation superiority message is raised by the express reference to imitation slices in the audio and copy portions of the ads and the use of comparative language ("hardly any," "but"). We find that the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio portion refers to Kraft Singles and states "so her little bones get calcium they need to grow," create a net impression that Kraft Singles contain more calcium than most imitation slices. Since no element in the ads effectively corrects this impression, we conclude that the "Skimp" ads on their face contain elements that reasonable consumers are likely to take as communicating an imitation superiority message. We also conclude that the weight of the probative extrinsic evidence in the record is consistent with our conclusion that one net impression conveyed to reasonable consumers by the "Skimp" ads is the imitation superiority claim.[15]

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[15] This evidence includes, but is not limited to, the MOR survey results which, taking into account control group responses, indicate that between 23 percent and 39 percent of survey respondents took the imitation superiority message from the challenged "Skimp" ad language in response to closed-ended questions (ID at 69; see IDF 161-163, 170-171; see also ID at 69; IDF 92, 95, 184); and the opinion of marketing expert Dr. Stewart (IDF 71; see Tr. 1081-82). We have considered the extrinsic evidence cited by Kraft in support of its contention that the "Skimp" ads do not convey an imitation

(continued...)

b. The "Class Picture/5 ounce" Ads

While the Initial Decision can be read as holding that the "Class Picture/5 ounce" ads also convey the imitation superiority claim, the precise basis for the ALJ's conclusion on this issue is not clear. His general statement that:

> ads containing the same elements . . . are likely to give reasonable consumers the net impression of . . . imitation superiority as charged in the complaint

(ID at 64) is not dispositive. The imitation superiority claim cannot be ascribed to the "Class Picture/5 ounce" ads by relying on the presence of elements found to convey that claim in the "Skimp" ads, because the ALJ found that "[the "Class Picture/5 ounce"] ads were not expressly comparative . . . . [due to the fact that they] did not mention imitations or substitutes." IDF 38; *compare* IDF 47. However, the ALJ did conclude that:

> other valid extrinsic evidence in addition to expert analysis of the ads' language establishes that the challenged messages which I and complaint counsel's experts find in the challenged ads were actually conveyed to consumers.

ID at 65.

The extrinsic evidence cited in the initial decision consists of certain results from Kraft's 1986 Communication Workshop Incorporated ("CWI") copy test (IDF 96), and the opinion of Dr. Deborah MacInnis, one of complaint counsel's marketing experts.[16] IDF 66, 69. The ALJ's conclusion would not appear

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[15] (...continued)
superiority claim, and conclude that this evidence does not outweigh the record evidence that is consistent with our reading of these ads. *See* discussion *supra* at note 13.

[16] No other expert witness besides Dr. MacInnis stated an opinion that the "Class Picture/5 ounce" ads conveyed the imitation superiority claim. Dr. Stewart, who designed the MOR copy test
(continued...)

to rest on the CWI data, however, because he separately concluded that none of Kraft's copy tests, including the CWI copy test, are probative.[17] ID at 69. And while the ALJ found the opinion of Dr. MacInnis generally to be entitled to "substantial respect" (ID at 65), the initial decision does not indicate what conclusion if any he drew from Dr. MacInnis's opinion on this specific issue.

We have reviewed the "Class Picture/5 ounce" ads and are not able to conclude with adequate confidence, by looking solely at the ads themselves, that reasonable consumers would understand them to be claiming that Kraft Singles contain more calcium than most imitation or substitute slices. Such representative ad copy as:

> KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommends for strong bones and healthy teeth.

contains no explicit comparison between Kraft Singles and non-dairy slices. Instead, the ads make claims only about the attributes of Kraft Singles, and do not contrast these attributes with those of non-dairy slices. Similarly, there are no visual cues that prompt a comparison with other slices. Where an examination of the ads does not provide us with sufficient information to determine whether reasonable consumers take the implied message urged upon us by complaint counsel, we will require extrinsic evidence before concluding that the ads convey the alleged implication. *See Thompson Medical*, 104 F.T.C. at 812; *Sterling Drug, Inc.*, 102 F.T.C. 395, 756-57 (1983).

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[16] (...continued)
which tested three "Skimp" ads, offered an opinion only as to the similarity in ad copy between the tested "Skimp" ads and the "Class Picture/5 ounce" ads as that pertained to the milk equivalency claim. IDF 134, 165; *see* Stewart Tr. 1155-56.

[17] While the ALJ found that reliance on the responses to closed-ended questions was appropriate (IDF 187), and described the one CWI question cited in his findings on this issue as a "closed-ended question" (*see* IDF 96), it is not clear that he intended to except the response to this one CWI question from his general conclusion that Kraft's CWI copy test is not probative.

In this instance, we find the extrinsic record evidence insufficient to support a conclusion that the imitation superiority claim is conveyed by the "Class Picture/5 ounce" ads. Both complaint counsel and the ALJ's findings cite results taken from Kraft's CWI copy test which indicate that 45 percent of the people surveyed took an imitation superiority message.[18] *See* CAB at 73-74; 12/7/89 Transcript of Oral Argument at 48-49; IDF 96. However, we are unable to conclude that this evidence is, on balance, reasonably reliable.[19] We also are not persuaded by

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[18] The CWI copy test surveyed forty participants in one city. CX 54 G-H; CX 36 B. Participants were asked if there was anything "said or shown [in the ad] that makes you think KRAFT Singles is different from other brands of individually wrapped cheese slices." IDF 96; *see* CX 58 Z-3. According to CWI's coding methodology, 45 percent of the participants said that what differentiated Kraft Singles was that they contain more calcium than other individually wrapped cheese slices. IDF 96; *see* CX 57 Z-32. Respondent argues that the 45 percent figure is not an accurate reflection of the messages consumers took from the tested ad, and that it overstates the actual response rate based on the underlying data. RAB 58 n. 45; *see* Simon Tr. 2035-36, 2039; RX 151; RX 128 Z133-Z237; Simon Tr. 2116-18.

[19] No measures were used in the CWI survey to correct for preexisting or inherent survey bias. *Compare Thompson Medical*, 104 F.T.C. at 807-08 (control measures used with both aided and unaided recall questions to minimize bias). The apparent 45 percent response rate suggesting that an imitation superiority message was taken by survey participants may well be attributable to consumers prior exposure to the "Skimp" ads, which did contain an explicit comparison to imitation slices, and which were disseminated extensively prior to the "Class Picture/5 ounce" ads. *See, e.g.*, CX 34C; CX 136R. We note that the control ads used in complaint counsel's Market Opinion Research ("MOR") survey also received relatively high response rates in support of an imitation superiority message. *See* IDF 126, 131; CX 196, pp. 51,84. The MOR survey results that we find probative, however, are the net

(continued...)

complaint counsel's marketing expert, and find her opinion to be inadequately supported with respect to this issue.[20] *See Thompson Medical*, 104 F.T.C. 790 & n.11.

We therefore conclude that the milk equivalency claim is conveyed by both the "Skimp" ads and the "Class Picture/5 ounce" ads, and that the imitation superiority claim is conveyed only by the "Skimp" ads.

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[19] (...continued)
results derived from the test and control ads together. *See* notes 13 & 15, *supra*; *see also* ID 69; IDF 127-31.

[20] Dr. MacInnis interpreted the "Class Picture/5 ounce" ads as implying that Kraft Singles have more calcium than competing cheese slices. IDF 66; Tr. 117-19. As the basis for her copy analysis, Dr. MacInnis cited both "pragmatic implications" theory, which concerns linguistic constructions that automatically cause listeners to hear more than what is directly asserted, and the corollary concept of "implied slur." Tr. 78, 81, 118-19. According to Dr. MacInnis, by stating that Kraft Singles are concentrated with calcium, the implication is that competing slices are not concentrated with calcium. Tr. 118-19. *See also* Tr. 163-64. However, given the absence of any explicit comparative elements from the "Class Picture/5 ounce" ads, we are unwilling to read an imitation superiority implication into these ads without better evidence that reasonable consumers would be likely to take such a message. *See, e.g.*, *Bristol-Myers Co.*, 102 F.T.C. 21, 326-27 (1983). Dr. MacInnis cited the CWI copy test results, discussed above, as corroborating her analysis with respect to the television commercial version of "Class Picture/5 ounce." Tr. 119, 168-69; *see* Tr. 275, 329. However, nothing in her testimony alleviates our concerns about the reliability of the CWI survey evidence, and thus it does not provide her opinion with adequate support. Dr. MacInnis also referred to empirical research supporting the general principle of "implied slur" in her analysis of the "Class Picture/5 ounce" ad copy. *See* Tr. 80, 83-84, 139-40. However, in this case we find her broad references to such research to be an insufficient basis on which to establish that application of this general principle is appropriate in this particular instance. *See* Tr. 252-68, 275.

C. Kraft's First Amendment Arguments

In addition to the First Amendment arguments discussed earlier in connection with the type of evidence required, respondent also contends that complaint counsel's theory of implied deception violates its First Amendment rights because certain evidence presented in this case would also classify as deceptive several other Kraft Singles ads that were not challenged in this proceeding. Respondent argues that the underlying findings of liability based on the record fail to distinguish meaningfully between lawful and unlawful advertising, thus violating First Amendment principles. RAB at 23, 31-32, 44-49; RRAB at 18-22, 56-57. Specifically, Kraft cites to testimony by complaint counsel's expert, Dr. MacInnis, that two unchallenged ads ("Shopping Dad" and "Tell Me When"), neither of which mention calcium, are deceptive because consumers could infer a milk equivalency claim from the reference to milk made in those ads. RRAB at 18-19; RAB at 23. Kraft also argues that results from complaint counsel's MOR copy test show that the unchallenged control ad used ("Taste of Cheese") conveys both of the implied calcium claims even though it does not mention milk, calcium, or competing products, and cites testimony by complaint counsel's experts in support of this argument. RAB at 25, 32; RRAB at 20-22. Finally, Kraft argues that the ALJ's apparent reliance on the testimony of Dr. MacInnis to find that the non-comparative "Class Picture/5 ounce" ads convey the imitation superiority claim similarly fails to distinguish meaningfully between deceptive and non-deceptive advertising. IDF 66; *see* RAB at 22-23; RRAB at 19-20.

Respondent's arguments, to the extent based on record evidence relating to advertisements not challenged in this proceeding, are without merit. It is no defense to a finding of deception in this case to assert that unchallenged ads might also be deceptive. The Commission is not obligated to challenge in a single proceeding all of the deceptive practices in which a respondent may be engaged. *See, e.g., Moog Industries, Inc. v. FTC*, 355 U.S. 411 (1958). Moreover, it would be inappropriate to speculate on the likelihood that we would find the unchallenged ads to which respondent refers to be deceptive, since a full record on the potential of those ads to deceive has not been developed and is not now before us. Respondent's argument that the findings in

this case relating to the challenged "Class Picture/5 ounce" ads are unconstitutionally overbroad is also without merit in light of our own findings and conclusions regarding liability with respect to that ad, as discussed in the preceding section.

III. WERE THE CLAIMS LIKELY TO MISLEAD REASONABLE CONSUMERS?

The standard by which advertising is judged is whether it is likely to mislead reasonable consumers; proof of actual deception is not required. *Cliffdale*, 103 F.T.C. at 165; *Deception Statement*, 103 F.T.C. at 176. In this case, having found that certain implied calcium claims are conveyed by the challenged ads, and having adopted the ALJ's findings and conclusions that such claims are false and unsubstantiated, we also conclude that such claims are likely to mislead consumers acting reasonably under the circumstances.

Despite respondent's assertions (*see* RAB at 21-22 & n.21; RRAB at 16-18 & n.14), we agree with the ALJ that it is reasonable to presume that a significant number of consumers are not aware that the calcium in five ounces of milk is reduced or lost during the processing of Kraft Singles, and that they are also not aware that imitation cheese slices may be fortified with calcium.[21] ID at 65 & n. 6; *see* IDF 70. The implied calcium claims in this case are credence claims because consumers cannot readily determine by purchasing and consuming Kraft Singles whether or not they are in fact providing the amount of calcium benefit

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[21] In appropriate circumstances, the Commission can presume that consumers are likely to reach false beliefs about a product because of an omission. *Deception Statement*, 103 F.T.C. at 177. We also agree that the record does not support respondent's assertion that consumers generally would know that processed foods do not contain all of the same nutrients in the same amounts as the ingredients from which they are made (ID at 65; *see* RRAB at 16-17), or that a significant number of consumers were aware at the time the ads were disseminated that imitation cheese slices may be fortified with calcium (ID at 65 & n.6; IDF 70).

implicitly promised.[22] *Thompson Medical*, 104 F.T.C. at 834; *American Home Products Corp.*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982). Therefore, reasonable consumers would not be aware of these facts.

IV. WERE THE CLAIMS MATERIAL?

The Commission will find an advertisement deceptive if there is a claim or omission that is likely to mislead consumers acting reasonably under the circumstances, and the claim or omission is material. *Thompson Medical*, 104 F.T.C. at 816; *Cliffdale*, 103 F.T.C. at 164-165; *Deception Statement*, 103 F.T.C. at 175-76, 182-83. A "material" misrepresentation is one that involves information that is important to consumers, and that is therefore likely to affect a consumer's choice of or conduct regarding a product. Proof of actual consumer injury is not required. *Cliffdale*, 103 F.T.C. at 166 n. 11; *Deception Statement*, 103 F.T.C. at 183. The Commission presumes several types of claims to be material: express claims; implied claims where there is evidence that the seller intended to make the claim; and claims or omissions that significantly involve health, safety, or other areas with which reasonable consumers would be concerned, *e.g.*, those pertaining to a product's purpose, safety, efficacy, or cost. *Thompson Medical*, 104 F.T.C. at 816-17; *Deception Statement*,

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[22] Nor do we find it reasonable to expect consumers to ascertain the accuracy of respondent's calcium claims by comparing the nutrient information provided on the labels of milk, Kraft Singles, and imitation and substitute slices, even though it may be technically possible to do so. *See American Home Products Corp.*, 98 F.T.C. 136, 370 (1981), *aff'd*, 695 F. 2d 681, 688 (3d Cir. 1982) (disclosure on product label did not cure deception in advertising). A comparison between the calcium content of Kraft Singles and milk would require considerable calculation since the nutrient information on milk cartons is not based on a five ounce serving. *See* CRB at 17 n. 16. Kraft's materiality survey shows that 98 percent of the survey participants did not know how much calcium is contained in five ounces of milk. RX 82E, Z-2.

103 F.T.C. at 182-83. In addition to information that is presumptively material, the Commission may also find materiality based on evidence that the claim or omission is likely to be considered important by consumers. *Deception Statement*, 103 F.T.C. at 183.

The ALJ concluded that the calcium claims in the challenged advertisements are significant health claims and thus presumptively material. IDF 188, 190; ID at 70. He also cited as probative, *inter alia*, evidence that the calcium claims were intended to induce consumers to purchase Kraft Singles, and that Kraft believed that the challenged ad copy contributed in some degree to the increased sales of the product. IDF 90-91, 189, 191-93; *see also* IDF 23, 27, 87. He rejected survey evidence that Kraft introduced to rebut the materiality of the claims, finding that the survey had not presented participants with sufficient response options to reveal all of the ways in which the implied claims at issue might affect consumer conduct with respect to Kraft Singles or alternative products.[23] IDF 194-210; ID at 70-71.

Respondent argues that the ALJ erred by basing his determination on a presumption that calcium claims generally are material, rather than explaining why the specific calcium claims at issue are material. *See* RAB at 61-63; RRAB at 67-70. We agree that the ALJ did not explicitly discuss why the "milk equivalency" and "imitation superiority" claims are independently material. Accordingly, we examine the issue ourselves. We conclude that each of the implied calcium claims in this case is material.

A. Materiality of Milk Equivalency Claim

We find that the milk equivalency claim is material. We agree with the ALJ that the results of Kraft's materiality survey confirm the importance of calcium as a factor in consumers' purchase decisions with respect to the product. Of the survey participants, 71 percent rated "a source of calcium" as an "extremely" or "very

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[23] The ALJ found that another significant fault in the survey was its failure to tell survey respondents that the ads made a claim of milk equivalency, thus providing no basis for a conclusion as to the impact of the claim on consumer behavior. IDF 207.

important" factor in their decision to buy Kraft Singles.[24] IDF 190; *see* RX 82W. Other evidence shows that comparative information about the calcium benefit of products would likely have been considered particularly important to consumers with calcium deficiency concerns, *e.g.*, mothers with children, pregnant women, and postmenopausal women. CX 41C; *see also* CX 78A; Recker Tr. 594-99, 726-30. For example, a January 1985 Kraft consumer survey shows that 52 percent of women surveyed who were purchasers of American cheese slices, and 40 percent of total survey respondents, reported significant personal concern about getting enough calcium. CX 137F-H; CX 33A; CX 303C.

The record shows that Kraft designed the challenged ads to capitalize on consumers' calcium deficiency concerns. *See* CX 32C. The target audience for both the "Skimp" and "Class Picture/5 ounce" ads was identified as female homemakers (aged 25-54) with children. CX 6J; CX 129E. The "Class Picture" ad copy, in particular, played upon the likely concerns of mothers with school-age children. *See* CX 54C; CX 56A. A Kraft analysis conducted to substantiate claims made in an earlier, unchallenged version of the "Class Picture" ads points out that girls aged 9-11, for example, require an additional 92 mg. of calcium per day on average to reach their RDA of calcium. CX 177E; CX 178D. Based on Kraft's analysis, we observe that the 60 mg. difference between the calcium content of five ounces of milk and that of a 3/4-ounce slice of Kraft Singles would account for most of the additional calcium needs of girls in this age group if a five ounce glass of milk were substituted for a slice of Kraft Singles daily. *Accord* Recker Tr. 603-04; CX 327, p. 72. Inasmuch as the calcium equivalency claim would be difficult for consumers to evaluate, consumers would likely rely on the accuracy of the nutritional information implied in the ads. We therefore conclude that the misleading milk equivalency claim was a health claim of importance to reasonable consumers, particularly those segments

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[24] About half of all American households purchase Kraft Singles, the largest selling product in the individually wrapped process cheese food slices category. IDF 13.

targeted by the ads.[25] *Deception Statement*, 103 F.T.C. at 182 n. 46; *see Cliffdale*, 103 F.T.C. at 172, 173.

We find further evidence of materiality in certain conduct by Kraft which suggests that Kraft itself considered that the challenged milk equivalency ad copy helped to induce consumer purchases of Kraft Singles. In October 1985, the Center for Science in the Public Interest ("CSPI"), a consumer group, informed Kraft that it believed the "Skimp" ads conveyed the message that a slice of Kraft Singles had the same amount of calcium and other nutrients as five ounces of milk, and asked that the ads be changed. IDF 88. The chief marketing employee for Kraft Singles recommended that the "Skimp" ad copy not be changed in response to CSPI's complaint, stating as one reason that "[t]he Singles business is growing for the first time in four years due in large part to the copy." CX 63B; *see* IDF 191. Kraft eventually made a slight modification to the challenged "Skimp" ad copy, as discussed earlier, but this change was not aired until January 1986.

In November 1985, an earlier, unchallenged version of the "Class Picture" ads was introduced on a regional test basis to determine its viability as an alternative to the "Five Ounces of

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[25] According to respondent, the testimony of two marketing experts that consumers would always state a preference for a slice of Kraft Singles with 100 percent of the calcium of five ounces of milk over one with 70 percent, all other things being equal, says nothing about whether the difference between these amounts actually matters to consumers. RRAB at 74; *see* Stewart Tr. 1176-78; Jacoby Tr. 3664. We find, however, that in the circumstances of this case, an implicit 30 percent exaggeration of the calcium benefit in Kraft Singles is sufficiently likely to have affected consumers' choices with respect to the product to be considered material. *See* Recker Tr. 603-04, 758; CX 327, p. 72.

Milk" strategy.[26] CX 50; CX 6N-P; CX 67A. This version, known as "Class Picture/4 times" (or "Class Picture/I"), states that "ounce for ounce, Kraft Singles have over four times more calcium than milk," which is a true claim: one ounce of Kraft Singles has at least 4.7 times the calcium of one ounce of milk. CX 178C; CX 98. Subsequently, Kraft developed a version of "Class Picture" which incorporated the "five ounces of milk" message. *See* CX 6 Z-1. According to contemporaneous Kraft documents, both versions of "Class Picture" were intended to communicate that Kraft Singles are good tasting and a good source of calcium, but the "Class Picture II" (5 oz.) version "[d]irectly links calcium claim to 5 oz. of milk claim of the current national campaign."[27] IDF 90; *see* CX 36B; CX 56A.

In January and February 1986, respectively, the FTC and the California Attorney General's Office notified Kraft that investigations had been initiated to determine, *inter alia*, whether Kraft's ads conveyed the milk equivalency claim. IDF 88; *see* CX 286, CX 166. While copy tests conducted in late 1985 (on "4 times") and early 1986 (on "5 ounce") indicated that both versions of "Class Picture" were acceptable alternatives for meeting Kraft's marketing goals (*see* CX 36E), Kraft ultimately selected the "Class Picture/5 ounce" version for national dissemination in June 1986, explaining that this was done to avoid consumer confusion. Feldmann Tr. 1524; *see* CX 62 Z-9, Z-13. Kraft also did not adopt any of several other versions of "Class Picture/5 ounce" print and broadcast copy described in a J. Walter Thompson

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[26] An October 1985 "Creative Review" by J. Walter Thompson stated that "CSPI & competitive complaints have repeatedly threatened long-term use of '5 oz. of milk' claim." CX 6Z. A 1986 "Creative Strategy" stated that "[a]lternative strategy and copy is needed as a back-up to the currently contested advertising," and indicated that the regional test of "Class Picture/4 times" was to "determine viability of this 'non-5 oz.' copy in the event that use of '5 oz.' claim be discontinued." CX 11 B, C, E.

[27] A 1986 "Creative Strategy" stated as objectives: "[c]ontinue to realize benefits of '5 oz. of milk' advertising," and "[m]aximize impact of 'calcium/5 oz.' message on a national basis." CX 11C.

memorandum as "acceptable options which do not imply nutritional equivalence," even though there appeared to be some recognition, reflected in contemporaneous Kraft documents, of a possible "cause-effect relationship between '5 oz. milk' and 'calcium.'" CX 8A; *see also* CX 42; CX 84. We find it reasonable to infer from Kraft's persistence in using the challenged ad copy under these circumstances, and in making only minor modifications, that Kraft believed this copy contributed to consumer purchases of Kraft Singles.

B. Materiality of Imitation Superiority Claim

We also find that the imitation superiority claim is material. We agree with the ALJ that there is evidence suggesting that Kraft intended the "Skimp" campaign to convey an imitation superiority message.[28] IDF 91, 189. We find this evidence sufficient to

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[28] For example, a December 3, 1984 Kraft Marketing Research "Post Completion Summary" states:

> ACTIONS TAKEN (PLANNED) BASED ON RESEARCH: The "5 oz. of milk" theme will continue to provide the primary support for Kraft Singles differentiation. The next phase creative development will link the end benefits of taste and nutrition to the 5 oz. of milk comparative.

CX 120. A subsequent "Request for Marketing Research," dated January 4, 1985, identifies as the objective of the research on the new "Skimp" commercial:

> Measure the breakthrough and communication of the taste, nutrition benefits linked to the 5 oz. of milk reason why. The spot should communicate calcium as the key nutrition element, and more milk makes 'em good as the summary line. Retention of 5 oz. of milk as a measure of superiority is also key.

CX 122A. A March 28, 1985 Kraft Singles "Creative Presentation" states:

> Kraft Singles is the premium-priced brand in the IWPS category. However, it is not clear to consumers what the

(continued...)

allow us to presume the materiality of this claim.[29] We also agree that materiality is shown by evidence that the challenged ad copy led to increased sales, and find that there is sufficient evidence to infer that the imitation superiority message contributed to the increase in consumer purchases of Kraft Singles at a time when that product was priced about 40 percent higher than imitation slices. *See, e.g.*, IDF 190-192; *Deception Statement*, 103 F.T.C. at 183 & n. 57; *American Home Products Corp.*, 98 F.T.C. 136, 369-70 (1981), *aff'd*, 695 F. 2d 681 (3d Cir. 1982).

We have considered the results of Kraft's materiality survey, and agree with the ALJ's findings that it is insufficiently probative to rebut the evidence in support of the materiality of the milk equivalency claim.[30] IDF 194-210; *see* RX 82. In particular, we

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[28] (...continued)
difference is between Kraft and private label or imitation brands.

> Our current advertising addresses this situation by seeking to convince consumers that Kraft Singles is worth its premium price because of the superior nutritional value in its "5-oz of milk in every slice."

CX 32B.

[29] *See Deception Statement*, 103 F.T.C. at 182 & n. 51, *citing American Home Products Corp.*, 98 F.T.C. 136, 368-69 (1981):

> The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers.

A comparative claim such as this one, which not only describes the contents of the advertised product but also distinguishes that product from competing products, seems particularly likely to be material.

[30] Respondent argues that its materiality survey also demonstrates that the imitation superiority claim is not material because it shows
(continued...)

agree that the limited response options offered to survey participants did not adequately elicit all of the ways in which consumer conduct with respect to the product might be affected by the implied claims at issue. IDF 203, 205, 207-10.

V. SCOPE OF RELIEF

Having found that respondent's ads convey material claims that are false, unsubstantiated and likely to mislead consumers acting reasonably in the circumstances, we affirm the ALJ's conclusion that these ads violate Sections 5 and 12 of the Federal Trade Commission Act, and issue the attached order. The order we adopt differs significantly from the order entered by the ALJ in that we broaden coverage in Part I from "individually wrapped slices of pasteurized process, imitation or substitute cheese products" to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese," as proposed in the Notice order.[31] The final

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[30] (...continued)
that survey participants ranked calcium only seventh out of nine characteristics in terms of importance to their decision to purchase Kraft Singles, and thus, that a calcium superiority claim would not be material to consumers, RAB at 66, 69; RRAB at 77-78. We agree with the ALJ that the survey results confirm the importance of calcium to consumers in their purchase decisions since over 71% of the survey participants rated "a source of calcium" as an "extremely" or "very important" factor in their purchase decision. IDF 190.

[31] The order we issue differs from the ALJ's order in the following other respects: In Parts II, III, and IV of the order, we have made several language changes for clarification purposes. We have also modified the language of Part IV to require Kraft to provide a copy of the order to each of its operating divisions, and to all distributors of any products covered by the order, within thirty days after the order becomes final. Finally, Part V of the order has been amended to require Kraft to file a compliance report with the Commission within sixty days after the order becomes final, as well as at such other times as the Commission may require.

order prohibits misrepresentations about the absolute or comparative content of calcium or any other nutrient in the covered products, and prohibits any such nutrient content claim that is not substantiated by competent and reliable scientific evidence. We are persuaded that an order extending not only to Kraft Singles, but also to Kraft's other cheeses and cheese-related products, is warranted by the record in this case. We disagree that the narrower order entered by the ALJ is sufficient. We therefore grant complaint counsel's appeal.

The ability of the Commission to issue orders containing such fencing-in requirements is well established. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Sears, Roebuck & Co. v. FTC*, 676 F.2d 385, 391-92 (9th Cir. 1982); *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1250 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979); *ITT Continental Baking Co.*, 532 F.2d 207, 223 (2d Cir. 1976); *Litton Industries, Inc.*, 97 F.T.C. 1, 78-80 (1981), *aff'd*, 676 F.2d 364 (9th Cir. 1982). The Commission has wide latitude in fashioning appropriate orders to prevent inventive respondents from pursuing a course of conduct similar to that found to have been deceptive in the past. *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946). However, the Commission's discretion is subject to two constraints. First, to assure that the order is understood by the violator, the order's provisions must be sufficiently clear and as precise as circumstances permit. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 393; *American Home Products Corp. v. FTC*, 695 F.2d 681, 705 (3d Cir. 1982). Second, there must be a "reasonable relationship" between the remedy and the unlawful conduct found to exist. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 394-95; *Jacob Siegel Co. v. FTC*, 327 U.S. at 613; *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959) ; *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Jay Norris, Inc. v. FTC*, 598 F.2d at 1250-51; *Avnet, Inc. v. FTC*, 511 F.2d 70, 79 (7th Cir. 1975). To ensure that any order requirement bears a reasonable relationship to the unlawful conduct found to exist, the Commission considers the deliberateness and seriousness of the violation, the degree of transferability of the violation to other products, and any history of prior violations. *Thompson Medical*, 104 F.T.C. at 833; *see also Sears, Roebuck &*

Co. v. FTC, 676 F.2d at 391-92; *Litton Industries, Inc.*, 676 F.2d at 370-71.

The ALJ found that while respondent's misrepresentations were not an isolated occurrence, they were an "unintentionally deceptive response to significant competitive pressures." As the record did not evidence past deception, he concluded that there was no persistent, long-term pattern of deceptive advertising. ID at 71-72. We disagree with the ALJ's analysis, and conclude that the violations in this case were sufficiently serious and deliberate to warrant the broader product coverage we adopt in the attached order.

The seriousness of the violations in this case is evidenced by the size and duration of Kraft's misleading advertising campaign. The challenged ads were widely disseminated in print and broadcast media for two and one half years at a cost of more than $15 million annually. IDF 23, CX 34C; *see also* IDF 24-25, 29-36, 40-42; *Thompson Medical*, 104 F.T.C. at 833 & n. 79; *American Home Products Corp.*, 98 F.T.C. 136, 401 (1981), *aff'd*, 695 F.2d 681, 707 (3d Cir. 1982). The seriousness of the violation is also affected by the fact that consumers could not readily judge the truth or falsity of the implied calcium claims. *Thompson Medical*, 104 F.T.C. at 834.

Deliberateness is evidenced by Kraft's persistence in running the challenged ad copy despite repeated warnings from various outside sources that the copy might be implicitly misleading. *See Thompson Medical*, 104 F.T.C. at 834-35. In early 1985, prior to airing the "Skimp" commercials, the ABC television network requested substantiation for the "milk and calcium comparisons for Kraft Singles and imitation slices" that were conveyed in the "Skimp" script submitted for broadcast clearance. IDF 93-94. The record shows that Kraft's response to ABC's repeated requests for substantiation was inadequate and misleading (*see* IDF 93, 94, 235), and that a contemporaneous J. Walter Thompson legal memorandum acknowledged a possible imitation superiority claim and recommended that substantiation efforts be undertaken. IDF 95; CX 283; *see also* CX 165A; CX 226. Additional warnings followed in October 1985 from the Center for Science in the Public Interest, in January 1986 from the Federal Trade Commission, and

in February 1986 from the California Attorney General's Office. IDF 88. At the very least, this pattern of warnings suggests that Kraft knew or should have known that more investigation needed to be done to determine whether its ads were conveying misleading messages, notwithstanding Kraft's initial internal assessment that they were not. Moreover, although respondent was clearly aware of acceptable alternatives to the misleading ad copy, it declined to adopt them.[32] *See* discussion *supra* at Part IV.

Respondent argues that it should be entitled to rely on its own internal analyses of the results from its pre-dissemination consumer surveys. Kraft claims that it reasonably believed, based on its internal analyses, that the challenged ads conveyed no deceptive messages.[33] RAB 56-59, 70-78; RRAB at 56-62; *see* ID 71; IDF 80, 81, 84. However, respondent received repeated warnings from outside sources throughout the challenged ad campaigns, which should at least have alerted it that further inquiry would be appropriate, *e.g.*, copy testing designed to measure whether its ads conveyed the deceptive claims that were alleged. *See*, *e.g.*, *Thompson Medical*, 104 F.T.C. at 835-36 & n.82. While Kraft did take some steps in response to the allegations concerning the ads (*see* IDF 28), it made no attempt to determine whether those steps effectively corrected any implicitly deceptive messages. Feldmann Tr. 1710. *See*, *e.g.*, *Thompson Medical*, 104 F.T.C. at 836. We

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[32] We reject, as a ground for limiting the scope of the order in this case, the ALJ's conclusion that "Kraft could be liable in the future for implied claims which it never intended to make, and could not have predicted it could be found to have made," as well as the evidentiary basis upon which that conclusion appears to rest. *See* ID 72.

[33] Neither the lack of intent nor the existence of good faith is a defense to a Section 5 violation; advertisers are liable for materially misleading claims or omissions that their advertisements convey to reasonable consumers, even if this is done inadvertently. *See Chrysler Corp. v. FTC*, 561 F.2d 357, 363 & n. 5 (D.C. Cir. 1977); *Southwest Sunsites, Inc.*, 105 F.T.C. 7, 164-65 (1985), *aff'd*, 785 F.2d 1431 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986).

find that Kraft's reliance on its internal evaluation of its pre-dissemination copy test results was not sufficient in the circumstances.

Finally, we find that the violations in this case are readily transferable to other Kraft cheese products, given the general similarity between Kraft Singles and the additional cheese products that would be covered under the final order.[34] *See Thompson Medical*, 104 F.T.C. at 836; *American Home Products*, 98 F.T.C. at 405. Accordingly, this order will apply to "any product that is a cheese, related cheese product, imitation cheese, or substitute cheese." We do not find that the lack of a prior history of violations of this type outweighs the factors in support of such product coverage.

Respondent argues that any order entered in this case would chill and thus unconstitutionally restrict nondeceptive commercial speech. RAB at 70-78; RRAB at 56-62. We find these arguments to be without merit. First Amendment protections do not extend to commercial speech found to be false and deceptive. *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 110 S. Ct. 2281, 2287 (1990); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68-69 (1983); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*

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[34] Respondent's other cheeses and cheese products include the Cracker Barrel brand cheeses, Philadelphia Brand Cream Cheese, and Velveeta Pasteurized Process Cheese Spread. IDF 2. Respondent was on notice of the potential scope of product coverage we now adopt through the Notice Order attached to the Commission's complaint, and was also aware, through complaint counsel's proposed findings and briefs filed in this proceeding, that the rationale underlying the "ready transferability" argument is an asserted general similarity among Kraft cheeses and cheese products. Respondent has therefore had numerous opportunities, including at oral argument, to dispute the accuracy of this factual assertion, but has not provided any evidence indicating a pertinent distinction that would justify excepting any of its cheeses or cheese products from the order.

of New York, 447 U.S. 557, 563-64 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976). In this case, the only categories of commercial speech prohibited under the order would be advertising that is either expressly or implicitly false or deceptive, *i.e.*, unprotected speech that the government is free to restrict. We find that the record in this case establishes a reasonable fit between the violations found and the scope of the order's prohibitions.[35] *See Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3033-35 (1989) (First Amendment does not require use of "least restrictive means" but merely requires that there be a "'fit' between the legislature's ends and the means chosen to accomplish those ends.")

VI. CONCLUSION

For the reasons set forth above, we affirm the Administrative Law Judge's finding of liability, and modify the initial decision as described. An appropriate order is appended.

ISSUED: January 30, 1991

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[35] Also baseless is respondent's concern over possible "astronomical" civil penalties for advertising claims covered by the order that it could not have anticipated would be found misleading. RAB at 49, 71. In any action to enforce the order, the Commission would have the burden of proving that the challenged advertisement violates the order's prohibitions. Furthermore, in considering the appropriate amount of civil penalties on finding liability, a court could consider such factors as the willfulness of the violation and the good or bad faith of the defendant advertiser. Whatever remaining uncertainty the respondent faces with respect to its future conduct is no different from the uncertainty faced by any party under order. *See FTC v. Colgate-Palmolive Corp.*, 380 U.S. 374, 393 (1965).

APPENDIX A [to the FTC Opinion]

"Skimp"

Selected television and print advertisements

J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

TELEVISION COMMERCIAL

CODE NUMBER: KRPS4231	TITLE: "SKIMP/BLUE EYES"
CLIENT: Kraft, Inc.	LENGTH: :30
PRODUCT: Process Singles	STATUS: AS PRODUCED
1/25/85 cal	

VIDEO	AUDIO
CU OF LITTLE GIRL'S FACE. CU OF GIRL PICKING UP PACKAGE OF KRAFT SINGLES. CU OF PITCHER POURING MILK INTO GLASS. IT ONLY FILLS UP PARTLY. MILK CONTINUES TO POUR. IT FILLS UP GLASS FARTHER. SUPER: MILK AMOUNTS BASED ON CHEESE CONTENT KID EATS SINGLES SLICE. BI-PACK OF KRAFT PACKAGE & LITTLE GIRL EATING. © 1985 Kraft, Inc. DISS TO CU OF MILK POURING INTO GLASS WHICH ANIMATES BACK INTO KRAFT PACKAGE. DISS TO KID WITH PACKAGE. SUPER: MORE MILK MAKES 'EM GOOD.	LADY(VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her? So I buy KRAFT Singles. Imitation Slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they nee to grow. No, she doesn't know what that big KRAFT means. Good thing I do. SINGERS: KRAFT Singles. More milk make: 'em...more milk makes 'em good. LADY(VO): Skimp on her? No way.

CX-62 C-9208

10754

2887

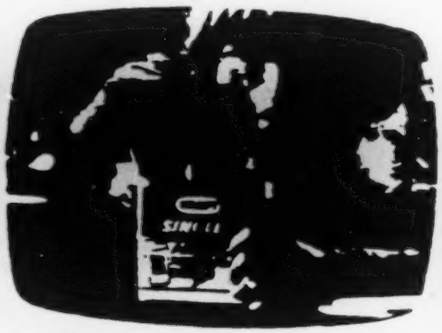
72a

KRAFT PROCESS SINGLES

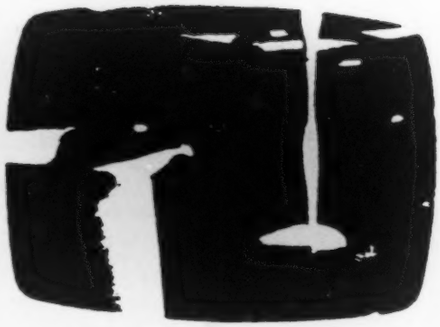
"Skimp/Blue Eyes" :30



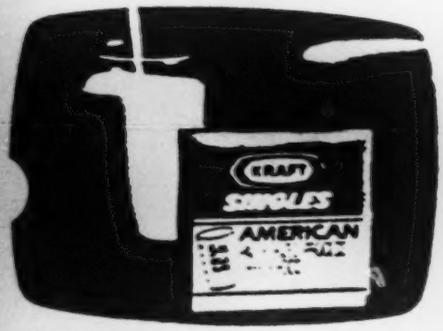
LADY (VO): I admit it. I thought of skimping. Could you look in those big blue eyes and skimp on her?



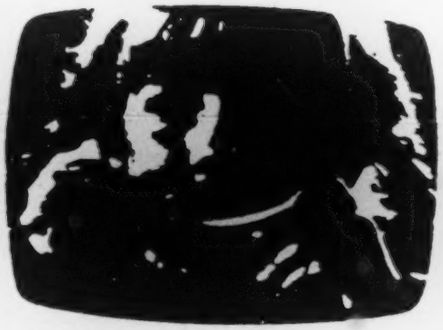
So I buy KRAFT Singles.



Imitation Slices use hardly any milk.



But KRAFT has five ounces per slice. Five ounces.



So her little bones get calcium they need to grow.



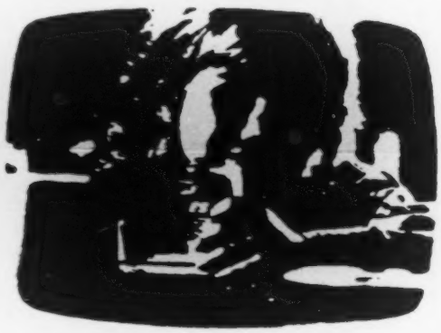
No, she doesn't know what that big KRAFT means. Good thing I do.



SINGERS: KRAFT Singles. More milk makes 'em...



more milk makes 'em good.



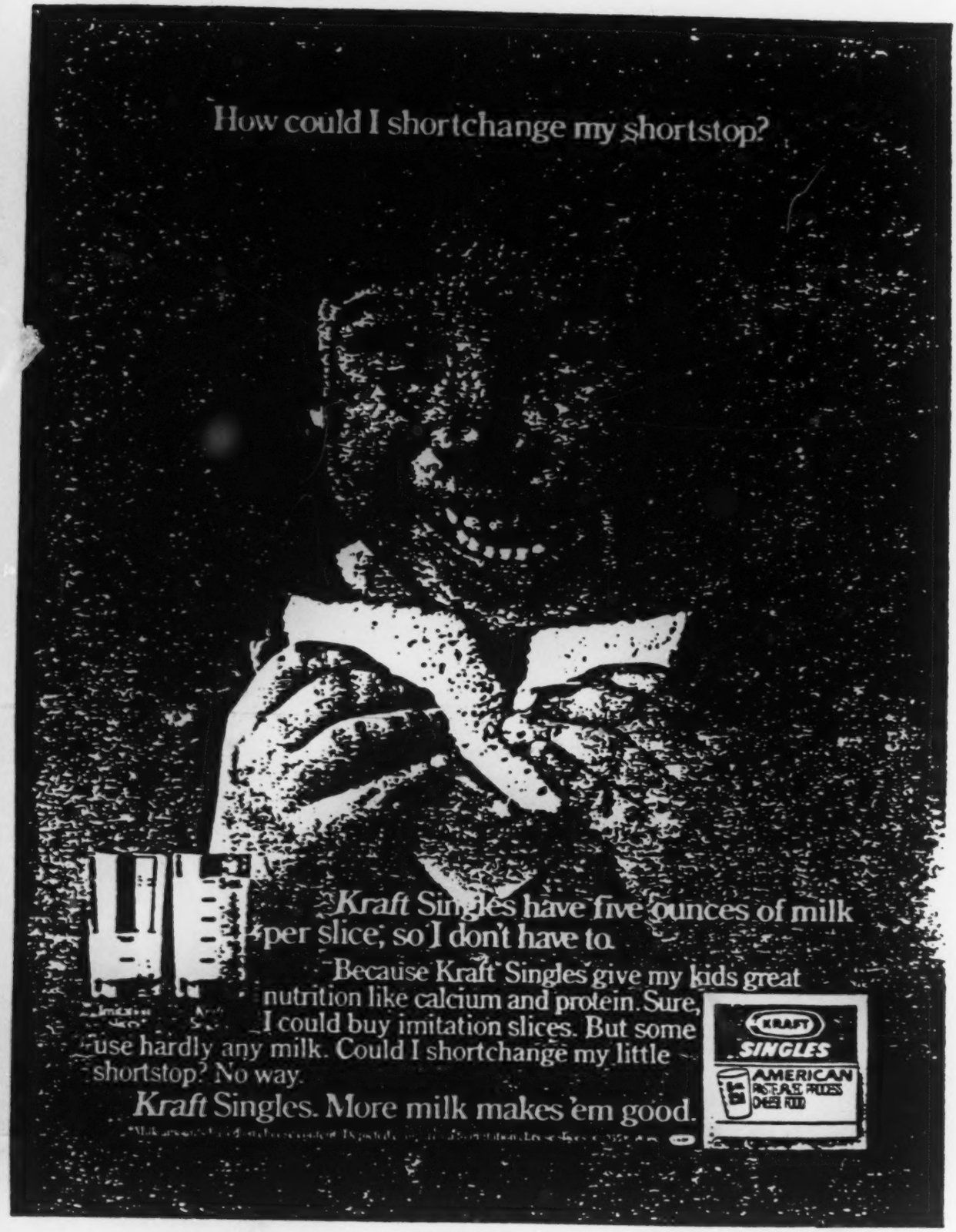
LADY (VO): Skimp on her? No way.

KRPS4231 MARCH, 1985

CX-62 Z-72-4105

10849
2888

73a



Shortstop 143141

Better Homes & Gardens 2/85, 5/85
Family Circle 3/19
Good Housekeeping 3/85
McCalls 5/85
Redbook 3/85
Parents 3/85
Southern Living 2/85, 5/85
True Story 4/85
Women's Day 4/2

CX-62 2-33-9209

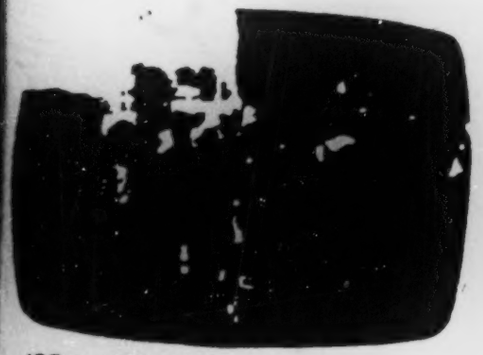
10810
2889

APPENDIX B [to the FTC Opinion]

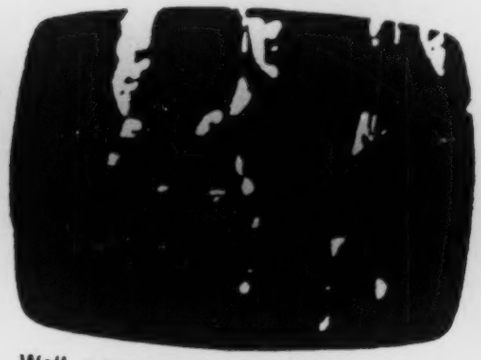
"Class Picture/5 ounce" ("Class Picture/II")
Selected television and print advertisements

KRAFT PROCESS SINGLES

"Class Picture/II" :30
(Five ounces Version)



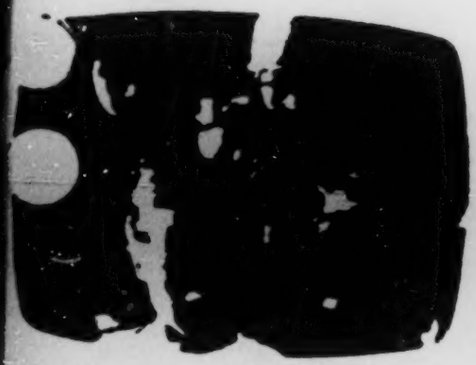
(SFX: MUSIC & KIDS TALKING, UNDER)
ANNCR (VO): Can you see what's missing in this picture?



Well, a government study says



that half the school kids in America

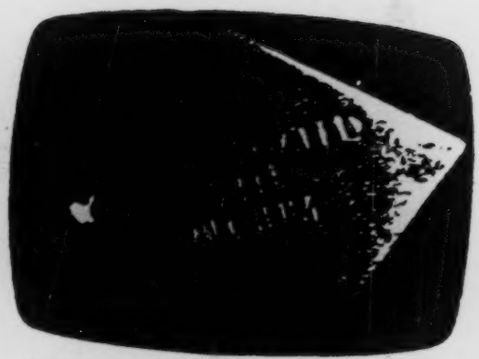


don't get all the calcium recommended for growing kids.



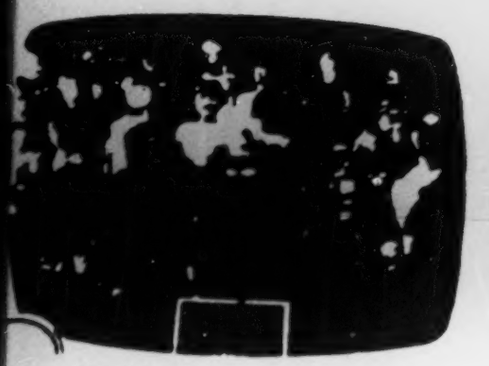
That's why KRAFT Singles are so important.

SUPER: AS PART OF A WELL-BALANCED DIET.



Kraft is made from five ounces of milk per slice. So they're concentrated with calcium.

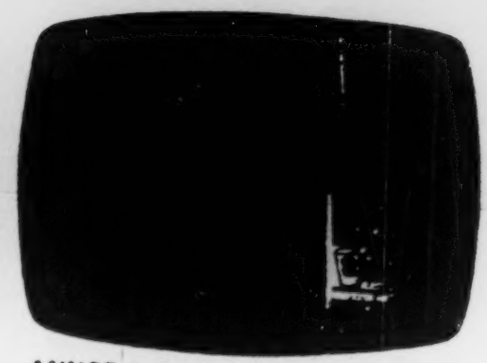
SUPER: ONE3/4 OUNCE SLICE HAS 70% OF THE CALCIUM OF FIVE OUNCES OF MILK. DEPICTION.



'um the government recommends rong bones and healthy teeth.



PHOTOGRAPHER: Say cheese!
KIDS: Cheese!



ANNCR (VO): Say KRAFT Singles. 'Cause kids love KRAFT Singles, right down to their bones.

CX-275 I4286

2890

KRPS6510 FEBRUARY, 1987

J. WALTER THOMPSON COMPANY

76a

J. WALTER THOMPSON COMPANY
875 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

TELEVISION COMMERCIAL

CODE NUMBER: KRPS6510 CLIENT: Kraft, Inc. PRODUCT: Process Singles kq 6/2/86	TITLE: "CLASS PICTURE/II" LENGTH: :30 STATUS: AS PRODUCED

VIDEO	AUDIO
KIDS GETTING THEIR SCHOOL PICTURE TAKEN.	ANNCR(VO): Can you see what's missing in this picture? Well, a government study says that half the school kids in America don't get all the calcium recommended for growing kids. That's why KRAFT Singles are important.
CU OF KRAFT SINGLES PACKAGE. SUPER: AS PART OF A WELL-BALANCED DIET. SUPER: ONE 3/4 OUNCE SLICE HAS 70% OF THE CALCIUM OF FIVE OUNCES OF MILK. DEPICTION.	KRAFT is made from five ounces of milk per slice. So they're concentrated with calcium. Calcium the government recommend for strong bones and healthy teeth.
TWO SLICES PUT ON BREAD. DISSOLVE TO KIDS. PHOTO IS TAKEN. PHOTO OF KIDS IN FRAME WITH PACKAGE IN FRONT.	PHOTOGRAPHER: Say Cheese! KIDS: Cheese! ANNCR(VO): Say KRAFT Singles. 'Cause kids love KRAFT Singles, right down to their bones.

CX-62 2-11-9208 10788

© Kraft, Inc. 1986

2891

77a

Half of these kids have a deficiency no one can see.



50% of America's children aren't getting their recommended dietary allowance of calcium. A government study has uncovered some startling facts. Half of America's children have diets that don't meet the calcium recommendations of the U.S. Food and Nutrition Board. And that's not good.

Because calcium is essential to your children during their growth years, when bones and teeth are developing rapidly. An adequate calcium level helps keep your child's bones growing straight and sturdy. And helps make sure new teeth grow in strong.

***Kraft* Singles are an excellent source of calcium.** In fact, *Kraft* Singles are made from 5 ounces of milk per ¾ ounce slice, so they're concentrated with calcium.*

Include *Kraft* Singles as a part of your children's well-balanced diet. You'll feel better knowing they're getting calcium recommended for strong bones and healthy teeth.



Kids love *Kraft* Singles, right down to their bones.

172060 Class Picture

Family Circle 4/14

CX-62 Z-55-9208

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APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604

AGENCY JUDGMENT
With Oral Argument

Date: July 31, 1992

BEFORE: **Honorable** Joel M. Flaum, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Thomas J. Curran, District Judge*

No. 91-1691

KRAFT, INCORPORATED,
Petitioner

v.

FEDERAL TRADE COMMISSION,
Respondent

Petition for Review of an order of the Federal Trade Commission
No. #9208

This cause was heard on the record from the Federal Trade Commission, and was argued by counsel.

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* The Honorable Thomas J. Curran, District Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

(1064-041692)

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the petition to set-aside the Commissioner's order is DENIED and the order is ENFORCED, with costs, in accordance with the decision of this court entered this date.

APPENDIX D

. Sections 5, 12 and 15 of the Federal Trade Commission Act (15 U.S.C. §§ 45, 52 and 55)

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) **Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade**

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(a)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless-

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect-

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such

method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question

was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

* * *

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

* * *

§ 52. Dissemination of false advertisements

(a) Unlawfulness

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement --

(1) By United States mails, or in or having an effect upon commerce, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce of food, drugs, devices, or cosmetics.

(b) Unfair or deceptive act or practice

The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in or affecting commerce within the meaning of section 45 of this title.

* * *

§ 55. Additional definitions

For the purposes of sections 52 to 54 of this title --

False advertisement

(a) (1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

* * *

APPENDIX E

Section 43(a) of Lanham Trade-Mark Act (15 U.S.C. § 1125(a))

§ 1125. False designations of origin and false descriptions forbidden

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-744

In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 15 U.S.C. 45(c), which requires that findings of the Federal Trade Commission be affirmed if supported by substantial evidence, violates the First Amendment as applied to the Commission's factual finding that a particular false claim has been made in an advertisement.

2. Whether the Federal Trade Commission may rely upon its own reasoned analysis of an advertisement, without resort to extrinsic evidence such as consumer surveys, to find that an advertiser has made an implied claim that is reasonably apparent from the face of the advertisement.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 970 F.2d 311. The opinion and order of the Federal Trade Commission (Pet. App. 29a-78a) and the initial decision of the administrative law judge are not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 79a-80a) was entered on July 31, 1992. The petition for a writ of certiorari was filed on October 29, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law * * * abridging the freedom of speech." Sections 5, 12, and 15 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, 52, and 55, and Section 43(a) of the Lanham Trade-Mark Act (Lanham Act), 15 U.S.C. 1125(a), are set forth at Pet. App. 81a-87a.

STATEMENT

1. Petitioner markets "Kraft Singles," which are individually wrapped slices of "pasteurized process cheese food." Kraft Singles compete with "imitation" and "substitute" cheese slices. "Imitation" cheese slices, which are typically made from water, vegetable oil, flavoring agents, and fortifying ingredients, are defined by the Food and Drug Administration (FDA) as "nutritionally inferior" to pasteurized process cheese food slices, but they may contain more of certain nutrients (*e.g.*, calcium) than do their dairy counterparts. "Substitute" cheese food slices contain less cheese than pasteurized process cheese food slices, but are not "nutritionally inferior" and need not be labeled "imitation." Pet. App. 2a, 33a-34a & n.2.[1]

In the early 1980s, Kraft Singles began to lose market share to an increasing number of non-dairy imitation slices that were advertised as both less expensive and more nutritious than dairy slices such

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[1] Consistent with usage by the court of appeals (Pet. App. 2a), petitioner (Pet. 3 n.2), and the Federal Trade Commission (Pet. App. 34a n.2), we will use the term "imitation slices" to denote both imitation and substitute slices.

as Kraft Singles. In response, petitioner created the "Five Ounces of Milk" campaign, which emphasized the fact that a slice of Kraft Singles is made from five ounces of milk, while imitation slices use very little milk, or are made predominantly from vegetable oil and water. Pet. App. 2a, 33a-34a.

As part of this campaign, petitioner developed the so-called "Skimp" advertisements, which ran nationally from February 1985 through June 1987. The Skimp advertisements were designed to communicate the nutritional benefit of Kraft Singles by referring expressly to calcium as the key nutritional element. Petitioner focused on calcium in order to capitalize on high consumer interest in that nutrient and to respond to advertising promoting other products, including imitation slices, as good sources of calcium. Pet. App. 3a-4a, 33a-35a.

Representative audio copy from one of the Skimp television advertisements states:

> Imitation slices use hardly any milk. But KRAFT has five ounces per slice. Five ounces. So her little bones get calcium they need to grow.

Pet. App. 42a. When the audio portion of the advertisement mentioned imitation slices, the visual image showed a small amount of milk being poured into the bottom of a glass. As the audio stated that Kraft has "five ounces" and "calcium," the glass filled with milk to the five-ounce mark. The advertisement also showed milk being poured into a glass and gradually transforming into a package of Kraft Singles bearing the phrase "5 oz. milk slice." *Id.* at 4a, 42a, 72a-73a.

A second series of advertisements, known as the "Class Picture" advertisements, ran nationally from June 1986 through January 1987. Although the

Class Picture advertisements stated that Kraft Singles are made from five ounces of milk per slice "[s]o they're concentrated with calcium," they did not expressly compare Kraft Singles to imitation slices. Pet. App. 4a-5a, 35a. The Class Picture advertisements were disseminated with a superscript that stated, "One ¾ ounce slice has 70% of the calcium of five ounces of milk." *Id.* at 49a.

Although a slice of Kraft Singles is made from five ounces of milk, each slice actually contains only 70% of the calcium of five ounces of milk, because a substantial portion of the calcium is lost in processing. Moreover, the vast majority of imitation slices sold in the United States during the relevant time period contained at least as much calcium as a slice of Kraft Singles. Pet. App. 3a, 37a-38a. In view of these underlying facts, petitioner began to receive complaints that its advertisements falsely implied that a slice of Kraft Singles contained the same amount of calcium as five ounces of milk (the "milk equivalency" claim) and that Kraft Singles contained more calcium than most imitation cheese slices (the "imitation superiority" claim). *Id.* at 19a, 26a, 67a-68a.

Nonetheless, petitioner persisted in running the Skimp and Class Picture advertisements. Petitioner did eventually make three modifications to the advertisements, however. In January 1986, petitioner revised the Skimp advertisement by changing the assertion "Kraft *has* five ounces per slice" to "Kraft *is made from* five ounces per slice." Pet. App. 42a (emphasis added).[2] Thereafter, in March 1987, near

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[2] Petitioner concedes, however, that this was "not a change in substance" and did not alter the advertisement's meaning. Tr. 1553.

the end of the Skimp campaign, petitioner added the disclosure that "one ¾ ounce slice has 70% of the calcuim of five oz. of milk." *Id.* at 43a. Petitioner also made an additional minor modification at that time. *Id.* at 43a n.10.

2. On June 17, 1987, the Federal Trade Commission (Commission) issued an administrative complaint charging that petitioner had violated Sections 5(a) and 12 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a) and 52, by making the false milk-equivalency and imitation-superiority claims in its Skimp and Class Picture advertisements. Petitioner was also charged with failing to possess and rely upon a reasonable basis for those challenged claims. Pet. App. 35a-36a.

After holding evidentiary hearings, the administrative law judge (ALJ) found petitioner had made the two challenged claims in both the Skimp and Class Picture advertisements. Moreover, the ALJ found that those claims were material, and that they were false and lacked a reasonable basis. Accordingly, the ALJ ordered petitioner to cease and desist from making those claims. Pet. App. 36a; see also *id.* at 5a.

3. Petitioner appealed to the Commission, challenging the ALJ's determinations that the claims had been made, that they were material, and that a remedial order was necessary. Petitioner did not contest the finding that the challenged claims, if made, were false and unsubstantiated. Pet. App. 36a-37a.

The Commission affirmed the ALJ's decision with some modifications. Pet. App. 29a-78a. In particular, the Commission agreed with the ALJ that petitioner had made both of the challenged claims. *Id.* at 6a, 55a.

The Commission identified several components of the Skimp advertisements that contributed to conveying the milk-equivalency claim: (1) the use of the word "has" in the phrase "Kraft has five ounces [of milk] per slice"; (2) repetition of the precise amount of milk—five ounces—in a Kraft Single, followed by an express reference to calcium; (3) use of the causal word "so" to link the reference to five ounces of milk with the reference to calcium; and (4) the visual image of milk being poured into a glass up to the five-ounce mark, and the superimposition of that image onto a package of Kraft Singles. Pet. App. 6a, 43a-44a.[3]

The Commission also found two elements of the Skimp advertisements that helped convey the imitation-superiority claim: (1) the express reference to imitation slices, coupled with the use of comparative language ("hardly any," "but"); and (2) the visual image of a glass containing very little milk during the audio reference to imitation slices, followed by the image of the glass being filled to the five-ounce mark while the corresponding audio referred to Kraft Singles and stated "so her little bones get calcium they need to grow." Pet. App. 6a, 51a. Although these findings were based initially upon the Commission's own analysis of the evidence present on the face of the advertisements, the Commission also

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[3] The Commission also found that the subsequent modifications to the Skimp advertisements were not sufficient to dispel the overall false impression of milk equivalency. Pet. App. 44a. In particular, the Commission found that the superimposed caption stating that "one ¾ ounce slice has 70% of the calcium of five ounces of milk" appeared only briefly in one frame of the television commercial in conjunction with another caption, and thus was unlikely to be effective as a corrective measure. *Ibid.*

examined the available extrinsic evidence and concluded that the reliable extrinsic evidence fully supported its determinations. *Id.* at 47a & n.13, 51a & n.15.

The Commission next examined the Class Picture advertisements and found that they were substantially similar to the Skimp advertisements and thus conveyed the milk-equivalency claim. Pet. App. 48a-50a.[4] The Commission noted that this conclusion could be supported by the advertisements themselves, but was also consistent with the weight of the probative extrinsic evidence in the record. *Id.* at 50a & n.14.

The Commission rejected, however, the ALJ's finding that the Class Picture advertisements conveyed the imitation-superiority claim. The Commission explained that the advertisements contained no explicit comparisons between Kraft Singles and non-dairy slices, and also contained no visual cues to prompt such a comparison. Because the imitation-superiority claim was thus not facially apparent, the Commission turned to the extrinsic evidence and, finding it insufficient, was unable to conclude that the claim was made by the Class Picture advertisements. Pet. App. 52a-55a.

The Commission also found that the false claims made by the advertisements were material to consumers. Pet. App. 6a, 58a-65a. To halt and prevent recurrence of petitioner's deceptive practices, the Commission adopted, in all pertinent respects, the

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[4] For the same reasons that led the Commission to conclude that the superimposed disclaimer was ineffective as a corrective measure with respect to the Skimp advertisements, it found that the equivalent disclaimer in the Class Picture advertisements was similarly ineffective. Pet. App. 49a-50a.

ALJ's remedial order prohibiting false or unsubstantiated nutrient-content claims. *Id.* at 7a, 65a-69a.

4. The court of appeals enforced the Commission's order in its entirety. Pet. App. 1a-28a. The court first rejected petitioner's claim that *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), required it to conduct an independent, *de novo* review of the Commission's factual findings concerning the claims made by petitioner's advertisements. Pet. App. 7a-9a. The court explained that the "substantial evidence" test is the standard of review traditionally applied to such factual findings by the Commission, and that, under this Court's decision in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385-386 (1965), the substantial-evidence standard is appropriate because of the Commission's extensive experience in this area and because its findings necessarily rest heavily "on inference and pragmatic judgment." Pet. App. 7a.

The court of appeals found petitioner's reliance on *Bose* and *Peel* unpersuasive, for several reasons. First, the court noted that it is at best unclear whether *Bose*, a libel case, has any application to cases involving mere commercial speech. Second, the court reasoned that *Bose* and *Peel* should not be read to overrule by implication a directly controlling precedent like *Colgate-Palmolive*. The court explained:

> [T]here are important distinctions between the sort of appellate review conducted in *Bose* and *Peel* and that done in *Colgate-Palmolive* and this case. The former involved review of court decisions, and courts generally lack the Commis-

> sion's expertise in the field of deceptive advertising.

Pet. App. 8a. Finally, the court concluded that *Peel* is clearly distinguishable from this case. *Peel* involved a prophylactic regulation prohibiting an entire category of commercial speech on the ground that it was potentially misleading as a matter of law. In this case, by contrast, the Commission made factual findings that particular advertisements conveyed specific false claims. Accordingly, the court concluded that the substantial-evidence standard governed its review of the Commission's factual findings concerning the claims made by petitioner's advertisements. *Id.* at 8a-9a.

The court of appeals next rejected petitioner's contention that the Commission erred as a matter of law in finding implied claims without resorting to extrinsic evidence such as consumer surveys. Pet. App. 10a-14a. The court noted that "[c]ourts, including the Supreme Court, have uniformly rejected imposing such a requirement on the FTC." *Id.* at 12a-13a. Adhering to this settled law, the court reaffirmed that "the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement." *Ibid.*

The court of appeals identified two flaws in petitioner's contention that the Commission must always rely on extrinsic evidence in finding that advertising contains an implied claim. First, the court explained:

> [Petitioner's contention] rests on the faulty premise that implied claims are inescapably subjective and unpredictable. In fact, implied claims

> fall on a continuum, ranging from the obvious to the barely discernible. * * * The implied claims [petitioner] made are reasonably clear from the face of the advertisements, and hence the Commission was not required to utilize consumer surveys in reaching its decision.

Pet. App. 13a. Second, the court concluded that petitioner's reliance on deceptive-advertising cases decided under the Lanham Act was misplaced. While courts in those cases have sometimes relied on extrinsic evidence, they have done so "because they are ill equipped—unlike the Commission—to detect deceptive advertising." *Id.* at 14a.

The court of appeals also rejected petitioner's contention that permitting the Commission to interpret advertisements without reference to extrinsic evidence would chill truthful commercial speech in violation of the First Amendment. Pet. App. 14a-16a. The court concluded that this claim was foreclosed by *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 652-653 (1985), which held that "no first amendment concerns are raised when facially apparent implied claims are found without resort to extrinsic evidence." Pet. App. 15a.

Furthermore, the court of appeals observed that extrinsic evidence was, in fact, available to and relied on by the Commission in this case. The court noted that the Commission thoroughly examined the available extrinsic evidence and found that it supported the Commission's findings. Pet. App. 16a.[5]

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[5] The court of appeals also rejected petitioner's remaining challenges to the Commission's order. The court concluded, *inter alia*, that substantial evidence supported the Commission's findings that the Class Picture advertisements made the milk-equivalency claim and that both of the challenged

Judge Manion concurred in the opinion and judgment of the court. Pet. App. 27a-28a. As a policy matter, however, he recommended that the Commission utilize its expertise to "develop a consumer survey methodology that advertisers can use to ascertain whether their ads contain implied, deceptive messages." *Id.* at 28a.

ARGUMENT

1. a. The FTC Act provides that the Commission's factual findings must be affirmed "if supported by evidence." See FTC Act § 5(c), 15 U.S.C. 45(c). In keeping with that statutory command, this Court and the courts of appeals have uniformly held that the Commission's factual determination that a particular claim was made in an advertisement must be upheld if it is supported by "substantial evidence." See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1965); *Removatron Int'l Corp.* v. *FTC*, 884 F.2d 1489, 1496-1497 (1st Cir. 1989); *Thompson Medical Co.* v. *FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), cert. denied, 479 U.S. 1086 (1987); *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554, 562 (2d Cir. 1984), cert. denied, 469 U.S. 1189 (1985); *American Home Prods. Corp.* v. *FTC*, 695 F.2d 681, 686-687 (3d Cir. 1982).[6]

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claims were material to consumers. Pet. App. 17a-21a. Finally, the court approved the scope of the Commission's order as no broader than reasonably necessary to prevent deception, and therefore not violative of the First Amendment. *Id.* at 22a-24a. The court also concluded that the breadth of the order was reasonably related to petitioner's violations, and was justified by the need to prevent future violations. *Id.* at 24a-27a.

[6] Contrary to petitioner's contention (Pet. 10), the substantial-evidence test requires more than "only the most per-

Petitioner contends (Pet. 11-20), however, that this Court's decisions in *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91 (1990), mandate reconsideration of the settled rule that the Commission's factual findings are reviewed under the substantial-evidence standard. According to petitioner, *Bose* and *Peel* require *de novo* review of the Commission's findings that advertisements are deceptive and thus not entitled to First Amendment protection. Petitioner's reliance on *Bose* and *Peel* is misplaced.

Bose was not a commercial-speech case at all. Rather, it involved an action for product disparagement—in essence, a libel suit—and the Court held only that, "in reviewing a determination of actual malice in a case governed by *New York Times Co.* v. *Sullivan*[, 376 U.S. 254 (1964)]," appellate courts "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514; see also *id.* at 511. *Bose* did not purport to decide whether a similar rule should be fashioned for cases involving commercial speech.

The *Bose* Court did observe that independent appellate review is required in cases involving certain other

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functory, deferential judicial review." Although substantial-evidence review does entail some deference to the Commission's expertise in interpreting advertisements, the standard nonetheless requires courts to assess the reasonableness and supportability of the Commission's interpretation. See, *e.g.*, *Removatron Int'l Corp.* v. *FTC*, 884 F.2d at 1496-1497. In this case, the court of appeals conducted a thorough, detailed review of the factual finding challenged by petitioner in order to ascertain the reasonableness of the Commission's decision (see Pet. App. 17a-18a); that detailed review may hardly be termed "perfunctory."

forms of unprotected speech—fighting words, incitement to riot, obscenity, and child pornography—in order "to ensure that protected expression will not be inhibited." 466 U.S. at 504-505. But *Bose* did not state or imply that a similar approach is required in the context of commercial speech. To the contrary, the Court explicitly noted that there is only "minimal 'danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive' " commercial speech. *Id.* at 504 n.22 (quoting *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring)). Given the stated rationale for requiring independent appellate review in non-commercial-speech cases—*i.e.*, the need "to ensure that protected expression will not be inhibited," 466 U.S. at 505—the Court's pointed observation that commercial speech is unlikely to be chilled strongly suggests that there is no need for independent appellate review in commercial-speech cases.

Peel is not to the contrary. In that case, an attorney was censured by the Illinois Supreme Court for violating a state ethics rule by using letterhead that described him as a certified legal specialist. This Court reversed and remanded, holding that the State's ethics rule violated the First Amendment. 496 U.S. at 111 (plurality opinion); *id.* at 112 (Marshall, J., concurring in the judgment). In rejecting the state supreme court's conclusion that representations about certification as a specialist were inherently misleading and thus not entitled to First Amendment protection, the plurality in *Peel* observed that "[w]hether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exer-

cise *de novo* review," citing *Bose* as analogous authority. *Id.* at 108.

Significantly, however, neither the attorney disciplinary commission nor the state supreme court in *Peel* had ever made any factual finding that the attorney's letterhead was actually deceptive. 496 U.S. at 101 (plurality opinion).[7] Instead, the state supreme court concluded, "as a matter of law, that [the attorney's] claims * * * were necessarily misleading." *Ibid.* Thus, *Peel* provided no occasion for the Court to address the question whether the First Amendment requires independent appellate review of *factual* findings by lower tribunals in commercial-speech cases; the plurality opinion cited *Bose* only by way of analogy as support for the indisputable proposition that the Court should exercise *de novo* review over the conclusion that a statement was inherently deceptive *as a matter of law.*

Moreover, a majority of the Members of the *Peel* Court never expressed an opinion on the question whether *de novo* review was appropriate in that context, nor did they cite *Bose.*[8] *Peel* thus cannot be read

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[7] In the present case, of course, the Commission determined as a factual matter that petitioner's advertising claims were deceptive. Pet. App. 23a, 37a-65a.

[8] Petitioner asserts (Pet. 13-14) that "Justice Marshall and Justice White, while not explicitly citing *Bose*, also clearly engaged in independent review in deciding" whether the challenged statement was inherently deceptive. Petitioner does not identify the particular passages that purportedly support that assertion, however, and we discern no basis for it in the actual language used by Justices White and Marshall. In any event, it need hardly be said that this Court does not decide important and controversial questions of constitutional law by avoiding any discussion of them.

to hold that a reviewing court must exercise independent review over factual findings in commercial-speech cases, and it sheds no light on the appropriate standard of appellate review in this case.

Petitioner also errs in contending (Pet. 13) that the courts of appeals have reached conflicting decisions concerning the need for *de novo* review of factual findings in commercial-speech cases. In the first place, none of the cases cited by petitioner involved appellate review of findings by the Commission, which has extensive experience and special expertise in the area of deceptive advertising.[9] Even if independent review were appropriate when appellate courts review trial court findings in commercial-speech cases, it would not necessarily follow that the same rule should apply in cases under the FTC Act. As this Court has recognized, the Commission, "which deals continually with cases in the area [of deceptive advertising], * * * is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [FTC] Act." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 385. Indeed, there would have been little reason for the statutory vesting of jurisdiction over such cases in the Commission if the function of de-

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[9] Numerous decisions of the courts of appeals recognize the Commission's expertise in ascertaining the meaning of advertisements. See, *e.g.*, *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 686-687; *Litton Indus., Inc.* v. *FTC*, 676 F.2d 364, 369 (9th Cir. 1982); *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d 294, 300 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137, 1145 (9th Cir. 1978); *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d 157, 161 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978).

termining the material facts were ultimately to be performed independently by reviewing courts.[10]

Moreover, the cases cited by petitioner are inapposite for other reasons as well. *Lindsay* v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), is not a commercial-speech case at all; rather, it involved a content-neutral ban on portable signs, a ban that affected commercial and non-commercial speech equally. 821 F.2d at 1105. *Lindsay* thus provides no guidance in determining the appropriate standard of appellate review in pure commercial-speech cases.

Similarly, *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988), while it did involve commercial speech, does not hold that appellate courts must apply *de novo* review to purely *factual* findings of lower tribunals in commercial-speech cases, which is the only claim properly before the Court in this case.[11] The

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[10] Petitioner's contention (Pet. 15-20) that independent review must be applied regardless of the identity of the trier of fact rests upon non-commercial-speech cases where independent review has been held to be a necessity because of the substantial risk in that context that freedom of expression will otherwise be chilled. Moreover, the cases petitioner cites in which courts refused to accord deference to agency determinations involved agencies that did not possess the Commission's congressionally mandated and judicially recognized expertise in the subject matter at issue.

[11] In the court of appeals, petitioner argued that the First Amendment required the court to scrutinize independently the Commission's "finding that the Class Picture ads convey the milk equivalency claim." Pet. C.A. Br. 32. Petitioner now attempts to recast its argument more broadly, suggesting that

court in *Don's Porta Signs* held instead that "an appellate court is not bound by the 'clearly erroneous' standard of review in determining whether a commercial speech regulation directly advances the government's goals or is more extensive than necessary." 829 F.2d at 1053 n.9. Those determinations, of course, are mixed questions of law and fact rather than pure questions of fact, and they involve ultimate constitutional questions rather than subsidiary factual issues. *Bose* itself indicates that, even where *de novo* review of ultimate constitutional questions is appropriate, deference must still be given to purely factual findings of lower courts. 466 U.S. at 513-514 & n.31. Thus, *Don's Porta Signs* is completely consistent with the decision below.[12]

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this Court should undertake *de novo* review of the Commission's "finding that commercial speech is misleading and therefore unprotected by the First Amendment." Pet. I. The fact remains, however, that petitioner merely asked the court of appeals to review *de novo* the Commission's purely factual finding that a particular implied claim was made by a particular advertisement. Because petitioner sought independent review in the court of appeals of that particular factual finding only, the issue before this Court is limited to whether review of such a finding is constitutionally mandated. See, *e.g.*, *EEOC* v. *FLRA*, 476 U.S. 19, 24 (1986) (Court's "normal practice * * * is to refrain from addressing issues not raised in the Court of Appeals"). Moreover, independent review of that subsidiary factual finding is the only form of appellate scrutiny that could possibly advance petitioner's cause, because it is undisputed that if the claims in question were made, they were deceptive.

[12] Moreover, the speech at issue in *Don's Porta Signs* was unquestionably protected commercial speech, and thus that case provides no support for petitioner's assertion that *de novo* appellate review is appropriate in deciding whether com-

Finally, *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), is very distinct from this case. While *Braun* may arguably be characterized as a commercial-speech case, it is an example of a significantly different category of cases from that presented here. In *Braun*, a wrongful death action was brought against the publishers of a magazine, alleging that they had negligently published an advertisement that created an unreasonable risk of solicitation of violent criminal activity. Thus, the defendants were not the persons whose speech had proposed a commercial transaction. As the court itself recognized, therefore, "[t]his case poses a greater risk than one finds in ordinary commercial speech cases that a state's regulatory regime or tort law will impermissibly chill publishers." 968 F.2d at 1117.

Braun would be apposite only if the Commission had brought the present case, not against petitioner, but against the television networks that ran petitioner's advertisements. Whatever the appropriate standard of appellate review may be in that category of cases, which present considerably more danger of a chilling effect, *Braun* cannot be read to hold that *de novo* review is required in more traditional deceptive-advertising cases where the risk that commercial speech will be chilled is minimal or nonexistent. See, *e.g.*, *Bose*, 466 U.S. at 504 n.22.[13]

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mercial speech falls outside the scope of the First Amendment's protections entirely.

[13] *Braun* is also distinguishable because the court in that case applied *de novo* review only to the ultimate question whether the publisher owed a legal duty under state law to the plaintiffs. 968 F.2d at 1120-1121. That mixed question of law and fact is more suited to *de novo* review than is the

Thus, no decision of this Court or of any court of appeals holds that independent, *de novo* review of factual findings should be exercised in deceptive-advertising cases.[14] The conflict alleged by petitioner does not exist, and further review is unnecessary.

b. In any event, *Bose* and *Peel*, even if fully applicable to the Commission's deceptive-advertising determinations, would not support petitioner's claim in this case. Nothing in the holdings or rationale of those decisions would suggest the propriety of *de novo* appellate reassessment of the Commission's purely factual finding that a particular claim was made in a particular advertisement. To the contrary, although an appellate court engaged in independent review is to reweigh whether the aggregation of facts found by the lower tribunal is sufficient to support the determination of an ultimate fact that is constitutionally required, the court must accept the pure (*i.e.*, historical) factual findings that are subsidiary in nature if supported by the record. See, *e.g.*, *Bose*,

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purely factual question at issue in this case, *i.e.*, the question whether a particular advertisement makes a particular claim.

[14] The *only* case identified by petitioner that reaches that conclusion is a district court decision, *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836 (D.P.R. 1990). In that case, while purportedly applying independent judgment to a government agency's determination as to the misleading nature of an advertisement, the court nonetheless accorded some deference to the agency by "acknowledging the view of an agency experienced in dealing with [misleading advertising]." *Id.* at 843-844. In any event, *Puerto Rico Tele-Com* is based upon a misreading of *Peel*, because it wrongly suggests that this Court refused to defer to the State's finding of deception. 747 F. Supp. at 843. In actuality, no such factual finding was ever made by the State in *Peel*. See *Peel*, 496 U.S. at 98 (plurality opinion).

466 U.S. at 513-514 & n.31; *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286 & n.26 (1964). The scope of independent review is therefore limited to evaluating the conclusion to be drawn from the aggregation of facts, which conclusion may be characterized as a question of constitutional fact.

The Commission's finding that a particular claim was made is a question of pure or historical fact. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 386 (sustaining Commission finding that a claim was made because "this is a matter of fact resting on an inference that could reasonably be drawn from the commercials themselves"); *Removatron Int'l Corp.* v. *FTC*, 884 F.2d at 1496-1497; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *Bristol-Myers Co.* v. *FTC*, 738 F.2d at 562; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 686-687. Here, as in *Bose*, independent appellate review would not entail reassessment of such subsidiary historical facts.[15] Rather, independent review would, at most, encompass constitutional facts—here, the ultimate determination of deceptiveness.[16] But in a straightforward

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[15] It would be burdensome and inefficient to involve the appellate courts in *de novo* reassessment of whether claims have been made by particular advertisements. To do so would encourage the taking of appeals solely for fact-finding purposes and would enmesh the courts of appeals (and, ultimately, this Court) in the "resolution of exceedingly complex and technical factual issues." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 645 (1985). Moreover, petitioner's reasoning would result in heightened review not only of Commission cases, but also of the increasing number of false-advertising cases brought by private parties under the Lanham Act, 15 U.S.C. 1125(a).

[16] This Court's decision in *Colgate-Palmolive* is particularly instructive. As the Court observed in that case, "the words

and purely factual false-advertising case like this one, such independent appellate review would be little more than an empty formality, because it is now well settled that it is a deceptive practice to make false claims about a product's significant attributes. See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 389. Thus, petitioner would not be entitled to relief even under its preferred standard of review.

There is, in sum, no basis for petitioner's claim that 15 U.S.C. 45(c), which requires findings of the Commission to be affirmed if supported by substantial evidence, cannot constitutionally be applied to the Commission's findings in deceptive-advertising cases. Further review of this issue is not warranted.

2. Petitioner also contends (Pet. 20-27) that, under the FTC Act and the Constitution, the Commission is *never* permitted to find that implied claims have been made in advertising unless it relies upon extrinsic evidence. That contention is incorrect, and is not worthy of review.

a. This case provides no occasion to resolve the question posed by petitioner, because the Commission in fact considered the available extrinsic evidence and

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'deceptive practices' set forth a legal standard and they must get their final meaning from judicial construction." 380 U.S. at 385. The Court then accepted as reasonable the Commission's factual findings with respect to the claims made, and proceeded to the ultimate question of deceptiveness by determining that the Commission correctly interpreted the statute as prohibiting "the misrepresentation of *any* fact so long as it materially induces a purchaser's decision to buy," rather than only such misrepresentations of "the substantive qualities of a product." *Id.* at 386-387. The Court then upheld the Commission's inference "that the deception will constitute a material factor in a purchaser's decision to buy" as sufficiently supported by the record. *Id.* at 392.

concluded that it supported the Commission's reading of petitioner's advertisements. Pet. App. 47a & n.13, 50a & n.14, 51a & n.15; see *id.* at 17a-18a.[17] Petitioner does not ask this Court to review the Commission's conclusions in that regard; nor does petitioner claim that it sought to introduce any additional extrinsic evidence and was prevented from doing so. Thus, petitioner would not be entitled to any relief even if the legal standard it espouses were to be adopted by this Court. Accordingly, review of this issue is not warranted.

b. Petitioner principally contends (Pet. 20-24) that the Commission and the court of appeals in this case have created a conflict with numerous cases decided under the Lanham Act by construing the FTC Act to permit the Commission to make findings of implied claims based solely on its consideration of an allegedly deceptive advertisement itself, without looking to extrinsic evidence of the advertisement's meaning. As petitioner observes, courts often look to extrinsic evidence in deciding deceptive-advertising cases under the Lanham Act. That fact does not suggest, however, that the Commission should be required to adhere to that same practice in FTC Act cases.

Federal district judges possess no special expertise in interpreting advertising, and thus recourse to ex-

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[17] The Commission does not ignore extrinsic evidence if presented, but instead considers it to the extent it is probative. Pet. App. 40a-41a; see, *e.g.*, *Cinderella Career & Finishing Schools, Inc.* v. *FTC*, 425 F.2d 583, 587-589 (D.C. Cir. 1970); FTC Policy Statement on Deception, appended to *In re Cliffdale Assocs.*, 103 F.T.C. 110, 174, 176 (1984). Judge Manion's concern (Pet. App. 27a) that the Commission is "free to ignore any such extrinsic evidence" is therefore unfounded.

trinsic evidence is often appropriate in the Lanham Act context, although there is no absolute requirement that such evidence be presented.[18] The Commission, by contrast, has extensive experience in this area, and thus has no need to consider extrinsic evidence in many cases. Indeed, numerous courts have explained judicial reliance on extrinsic evidence in Lanham Act cases in precisely this manner, while at the same time indicating that the Commission, with its specialized expertise, is not bound by similar constraints. See, *e.g.*, Pet. App. 13a-14a; *Sandoz Pharmaceuticals Corp.* v. *Richardson-Vicks, Inc.*, 902 F.2d 222, 228 (3d Cir. 1990); *American Home Prods. Corp.* v. *Johnson & Johnson*, 577 F.2d 160, 172 n.27 (2d Cir. 1978); *Procter & Gamble Co.* v. *Chesebrough-Pond's Inc.*, 588 F. Supp. 1082, 1094 (S.D.N.Y.), aff'd, 747 F.2d 114 (2d Cir. 1984). Accordingly, there is no conflict between the decision below and the cases construing the Lanham Act, and thus there is no "anomaly" (Pet. 22) for this Court to resolve.

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[18] Contrary to petitioner's assertions (Pet. 21), courts adjudicating deceptive-advertising claims under the Lanham Act have often found implied claims that are reasonably apparent from the face of the advertisements without reliance on extrinsic evidence. See, *e.g.*, *Johnson & Johnson* v. *GAC Int'l, Inc.*, 862 F.2d 975, 980 (2d Cir. 1988) (advertisement using "polysapphire" facially false because term "would suggest to most people * * * a substance made of many sapphires, or some variety or form of sapphire"); *Better Business Bureau, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982) (deceptive claim "clearly impl[ied]" by advertisements themselves); *American Home Prods. Corp.* v. *Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987) (survey evidence unreliable; false implication found from text of literally true advertisement).

Petitioner attempts to disparage the reasoning of the courts that have rejected its argument, and cites a series of law review articles for the proposition that the Commission in fact has no special expertise in this area. Pet. 22-24. But the unanimous judgment of this and other courts is to the contrary: The Commission's experience in the interpretation of advertising has been widely recognized and accepted,[19] and the law is clear that the FTC Act authorizes the Commission to rely upon its own reasoned analysis in determining what claims, including implied ones, are made by a particular advertisement, as long as those claims are reasonably clear from the face of the advertisement. Pet. App. 13a; see, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 386, 391-392; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *Bristol-Myers Co.* v. *FTC*, 738 F.2d at 562-563; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 687 n.10; *Simeon Management Corp.* v. *FTC*, 579 F.2d at 1146 n.11.

c. Petitioner also contends (Pet. 25-27) that the Commission's practice of deciding some cases without reliance on extrinsic evidence will impermissibly chill truthful, non-misleading advertising. As this Court has repeatedly recognized, however, there is only "a minimal 'danger that governmental regulation of false or misleading * * * product advertising will chill accurate and nondeceptive commercial expression.' " *Bose*, 466 U.S. at 504 n.22 (quoting

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[19] See, *e.g.*, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 385; *Thompson Medical Co.* v. *FTC*, 791 F.2d at 197; *American Home Prods. Corp.* v. *FTC*, 695 F.2d at 687 n.10; *Litton Indus., Inc.* v. *FTC*, 676 F.2d at 369; *Porter & Dietsch, Inc.* v. *FTC*, 605 F.2d at 300; *Simeon Management Corp.* v. *FTC*, 579 F.2d at 1145; *National Comm'n on Egg Nutrition* v. *FTC*, 570 F.2d at 161.

Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring)); see, *e.g.*, *Board of Trustees* v. *Fox*, 492 U.S. 469, 481 (1989); *Bates* v. *State Bar*, 433 U.S. 350, 381, 383 (1977).

Moreover, as the court of appeals recognized (Pet. App. 15a-16a), this Court's decision in *Zauderer* v. *Office of Disciplinary Counsel*, *supra*, establishes that no First Amendment concerns are raised where, as here, reasonably apparent implied claims are found without the use of consumer surveys or other extrinsic evidence. The advertising at issue in *Zauderer*, like the advertisements at issue in this case, was literally true but implicitly misleading on its face. The Court held that "[w]hen the possibility of deception is as self-evident as it is in this case, we need not require the State to 'conduct a survey of the * * * public before it [may] determine that the [advertisement] had a tendency to mislead.'" 471 U.S. at 652-653 (quoting *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. at 391-392). Under *Zauderer*, the Commission's practice of discerning facially apparent implied claims without reliance on extrinsic evidence is entirely appropriate.[20]

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[20] Petitioner maintains that *Zauderer* is distinguishable because the advertisement at issue in that case was "facially misleading" based upon "normal definitions," whereas here, the alleged false claims are not derived from "common understandings," but from "inferences and deductions that consumers supposedly would make." Pet. 27. In both *Zauderer* and this case, however, the advertisement was found to be deceptive based on the common-sense assumption, made without resort to extrinsic evidence, that consumers would misinterpret literally truthful wording due to omitted information of which they would likely be unaware. See 471 U.S. at 652; Pet. App. 42a-55a, 57a-58a. Petitioner may doubt the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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correctness of that common-sense assumption on the facts of this case, but that doubt reflects nothing more than a fact-bound disagreement about the application of settled legal principles; *Zauderer* unambiguously holds that the First Amendment permits a finding of implicit deceptiveness without recourse to extrinsic evidence.

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No. 92-744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., THE AMERICAN ADVERTISING FEDERATION AND THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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No. 92-744

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

KRAFT, INC.,

PETITIONER,

v.

FEDERAL TRADE COMMISSION,

RESPONDENT.

In Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, INC., THE AMERICAN ADVERTISING FEDERATION AND THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

Amici curiae are associations whose members commission, create, and place the

vast majority of the nation's regional and national advertising.[1]

The American Association of Advertising Agencies, Inc. ("A.A.A.A."), is the national trade association of the advertising agency business, representing approximately 700 advertising agencies located throughout the United States. Members of the A.A.A.A. create virtually all national advertising placed by advertising agencies, as well as a significant amount of local and regional advertising. Most clients of A.A.A.A. member agencies are businesses selling goods and services to the public. Advertising agencies, along with their advertiser clients, are subject to the

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[1] Petitioner and respondent have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk.

regulatory jurisdiction of the Federal Trade Commission ("FTC" or "Commission"), and thus have a special interest in Commission practices that restrict commercial speech.

The American Advertising Federation ("A.A.F.") is a national trade association that represents virtually all elements of the advertising industry. Among A.A.F.'s members are companies that manufacture and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and television broadcasters, outdoor advertising organizations, and other media. A.A.F. members also include 21 national trade associations, more than 200 local professional advertising associations with 52,000 members, and more than 200 college chapters, with more

than 6,000 student members. A.A.F. members use almost all forms of media to advertise and communicate with consumers throughout the United States.

The Association of National Advertisers, Inc. ("A.N.A."), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of

commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici represent thousands of advertising agencies, advertisers, and others who participate in the advertising industry. From this broad-based, national perspective, amici are well-situated to explain the substantial and deleterious impact that the FTC's decision will have. Amici submit that the practical consequences of the FTC's decision will greatly impede both the business of advertising and the ability of consumers to receive useful commercial information.

The Constitution requires that appellate courts conduct an independent review of the evidence in the record when

a trier of fact has concluded that certain speech is not protected by the First Amendment and that the speaker therefore is subject to sanction. This principle is fully applicable to cases involving commercial speech. The decision below disregards this clear command, and so creates a constitutionally impermissible risk that some valuable, protected speech will be punished, as well as a risk that even more protected speech will be suppressed through self-censorship resulting from fear of erroneous punishment.

The Commission's decision that it need not consider extrinsic evidence will make it virtually impossible to predict when the Commission will find that any particular advertisement contains an implied misleading message. The decision

therefore creates intolerable uncertainty for members of the advertising community. Unable to determine whether any informative advertisement will subject them to liability, advertisers and those working with them will be forced to rely on advertisements that present the lowest possible "risk." Such advertisements will typically be those that present the fewest "hard" facts, and consumers thereby will be deprived of much useful and valuable information.

Amici agree with and support fully Kraft's arguments regarding the erroneous standard of review applied by the Seventh Circuit. This brief will focus on the severe impact that the FTC's approach -- which the Seventh Circuit approved -- will have on the advertising community and on consumers.

ARGUMENT

I. APPELLATE COURTS MUST REVIEW DE NOVO FTC DECISIONS STRIPPING ADVERTISEMENTS OF FIRST AMENDMENT PROTECTION

The principles clearly expressed in Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), and applied to commercial speech by six Members of this Court in Peel v. Attorney Registration and Disciplinary Comm'n of Illinois, 496 U.S. 91 (1990), govern review of FTC determinations that advertisements are untrue and therefore not protected by the First Amendment. Bose's holding -- that when the trier of fact in a defamation case finds "actual malice," the appellate court must independently determine whether the evidence supports that determination, 466 U.S. at 511 -- rested on the need "to be sure that the speech in question actually falls within [an]

unprotected category [of speech] and to confine the perimeters of any unprotected category within acceptably narrow limits." Id. at 505.

That need is as great here as it was in Bose. Truthful advertising, like the product review at issue in Bose, informs consumers about the qualities of the advertised product, and (often) about how it compares with other products, thereby facilitating informed decision-making and furthering the consumer's "quest for truth." Bose, 466 U.S. at 503.

Nothing in Bose provides grounds for the Seventh Circuit's refusal to apply de novo review to the FTC's restriction on commercial speech. In fact, the opinion points in precisely the opposite direction, stating that "the rationale for [viewing false and misleading speech

as an unprotected category of speech] would be essentially the same as that involved in the libel area." Id. at 504 n.22. (The question whether speech fell into "the libel area" was, of course, the very question that Bose held subject to de novo review.) That is no doubt why, in Peel, six Justices of this Court either expressly stated that de novo review was required, or conducted, albeit without citing Bose, an independent review of the record. See Peel, 496 U.S. at 108 (plurality op.); id. at 111-15 (Marshall, J., concurring in the judgment); id. at 118 (White, J., dissenting). The Seventh Circuit's application of the "substantial evidence" standard disregards the teaching of Bose and Peel.

That the initial trier of fact is the FTC, as opposed to a federal or state

court, cannot change the constitutional requirement announced in Bose. As we discuss in Point II, below, the FTC's "expertise," whatever it may encompass, does not extend to determinations about how reasonable consumers will perceive any implied messages in an advertisement. See generally Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 678 (1977). Even assuming that the FTC has meaningful expertise in such matters, moreover, that fact provides no basis on which to distinguish Bose. "The requirement of independent appellate review . . . is a rule of federal constitutional law. . . . . It reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties

established and ordained by the Constitution." Bose, 466 U.S. at 510. The identity of the trier of fact, or its relative expertise, cannot alter this constitutional requirement.

Indeed, Bose rejected the "clearly-erroneous" standard of Federal Rule of Civil Procedure 52(a), 466 U.S. at 514, which, like the "substantial evidence" standard applied by the Court of Appeals here, is a "deferential" standard of review premised on the comparative advantage that the trier of fact enjoys over the appellate court in resolving certain issues. See Fed. R. Civ. P. 52 and Adv. Comm. Note thereto. Even assuming the FTC enjoys such an advantage on the issue of implied meaning, the point of Bose is that the advantage is insufficient to outweigh the

risk posed by a deferential standard of review -- that "[p]roviding triers of fact with [only] a general description of the type of communication whose content is unworthy of protection [will] not . . . serve[] sufficiently to narrow the [unprotected] category." 466 U.S. at 505.[2] That is why "[j]udges, as expositors of the Constitution, must

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[2] The Seventh Circuit's observation that Bose and Peel "involved review of court decisions, and courts generally lack the Commission's expertise in the field of deceptive advertising" (Pet. App. 8a), misses the point. Those cases did review "court decisions," but the issues decided, and reviewed, were issues as much within the fields of the lower courts' expertise as false advertising is within the Commission's. Compare Bose, 466 U.S. at 574 (decision about "actual malice," i.e. existence of intent or reckless disregard) with Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982) (decision about "discriminatory intent" or "actual motive"; clearly erroneous standard of Rule 52(a) held applicable).

independently" review the record, id. at 511, and why the Constitution does not permit extending deference to the FTC's findings on matters of this sort.

II. THE FTC SHOULD NOT BE PERMITTED TO DETERMINE THAT AN ADVERTISEMENT IS IMPLICITLY MISLEADING WITHOUT CONSIDERING EXTRINSIC EVIDENCE

The court of appeals decision leaves advertisers with little means of predicting whether the Commission later will determine that a particular advertisement is misleading. Even if extensive testing of advertisements on actual consumers shows that an advertisement does not convey a message that misleads, the Commission could reach the contrary conclusion based solely on the reaction of the individual Commissioners to the advertisement. The FTC's legal standard thus places advertisers under an intolerable risk of

being second-guessed and sanctioned by the Commission. The advertising community's inevitable reaction to the Commission's approach will be to shy away from advertisements that convey hard information, depriving consumers of data that would greatly assist them in making purchasing decisions.

Amici emphasize that their members have no desire to mislead the public, and have strong incentives to avoid doing so. An FTC determination that an advertisement is misleading not only carries legal sanctions; it also can damage the reputations of the advertiser, its agency and all those connected with the advertisement. See, e.g., Horovitz, Volvo, Agency Fined $150,000 Each For TV Ad, L.A. Times, Aug. 22, 1991, at D2 (noting that the determination

"represent[ed] a major embarrassment to" both the manufacturer and the agency involved). Significantly, this damage will occur, and cannot be ameliorated, even if the FTC's determination is incorrect.

A. The FTC's Rejection of Extrinsic Evidence Creates Intolerable Uncertainty.

The FTC believes that it can conclusively determine the implied meaning of an advertisement simply by reading the advertisement itself, without any resort to, or consideration of, available extrinsic evidence of the advertisement's meaning. This rule ignores the fact that "implied meaning" by definition is not self-evident, and the fact that the Commission, acting alone, is not particularly well-suited to determine what implied messages consumers will perceive in an advertisement.

"[T]he correct implication" of a given communication "will vary depending on the background knowledge and the informational needs of the speaker and listener." Craswell, Interpreting Deceptive Advertising, 65 B.U. L. Rev. 658, 717 (1985). Advertisements, of course, have many listeners. Those listeners encounter advertisements in a variety of situations; the different types of "copy-tests" used by the advertising community are designed to replicate, as best as possible, those situations, so that the reactions of actual consumers may be predicted. See Comment, The Use and Reliability of Survey Evidence in Deceptive Advertising Cases, 62 Or. L. Rev. 561, 584-85 (1983).

The FTC, by contrast, is neither an objective judge of such consumer

reactions nor a good substitute for them. The context in which a statement is made and heard is crucial to understanding the meaning, especially the implied meaning, of any remark. Craswell, 65 B.U. L. Rev. at 716-17. Yet, the Commissioners are likely to encounter a challenged advertisement first as the subject of a complaint. In that context, not only are they alerted to look for any possibly misleading implied meaning, but they are told by FTC enforcement staff precisely which implied meaning to look for. Not surprisingly, they often find it. Their discovery, under the circumstances, has relatively little probative value for the question they purport to be answering -- whether consumers, acting reasonably under the circumstances they are in, would think that the advertisement

contained such a message (see Pet. App. 38a). Consumers do not view an advertisement in a vacuum, and certainly not after having been told that it contains a misleading implication. Not only are the Commissioners institutionally predisposed to perceive implied messages, but their training and background are such that they are likely to "discover" implied messages that lay consumers would not recognize. FTC Commissioners are frequently "highly trained attorneys with very specialized views of advertising, [who] lack the perspective to accurately identify the meaning given to an advertisement by the general public." Comment, 62 Or. L. Rev. at 572 (citation omitted). They are therefore quite likely to "read into" an

advertisement messages unlikely to be perceived by a member of the public at large.

The defect in the FTC's "no extrinsic evidence" rule is not simply that it is a poor means of ascertaining whether an ad is misleading. The Commission's approach is also inherently unpredictable. In contrast to the rules applied by courts interpreting the Lanham Act (see Pet. 20-25) -- advertisers will have no way to determine in advance whether or not a proposed advertisement will be sanctionable.

It is common practice among national advertisers to copy-test an ad prior to dissemination by showing it to real consumers under realistic circumstances and discovering what messages, express or implied, the consumers take from the

advertisement. This permits advertisers to be as certain as they can be that consumers do in fact understand the message intended to be communicated, and also gives the advertisers the opportunity to determine that the advertisement presents no misleading messages and leaves no false impressions.

Prior to the FTC's decision in this case, this process of copy-testing also gave advertisers some measure of legal security: having ascertained that the public was not, in fact, being misled, they could run the advertisement confident that the FTC would consider the results of the copy-tests in any later proceeding. If the FTC claimed that the advertisement was likely to mislead some portion of the public, advertisers could refute that claim by introducing the

results of copy-tests showing that real consumers did not, in fact, see the implied messages "perceived" by the FTC.

If this Court denies review in this case, however, the Commission will be free to ignore such empirical data, and rely solely own its own "intuitive . . . hunch." Gellhorn, Proof of Consumer Deception Before the Federal Trade Commission, 17 Kan. L. Rev. 559, 565 (1969). Advertisers will be unable to rely on their empirical data showing that, in the real world, the advertisement did not mislead the public. Without the ability to rely on extrinsic evidence, advertisers must create and make decisions about advertisements based on little more than their predictions about how this small group of individual Commissioners, operating in artificial

circumstances, will react. Such a regime guarantees uncertainty, and that uncertainty will inevitably have drastic consequences for both the advertising community and the public.

B. The Uncertainty Created By The FTC's Decision Harms Both Advertisers And Consumers.

The uncertainty created by the FTC's "no extrinsic evidence" rule will have a very significant effect on the advertising community. Without an ability to predict, with reasonable accuracy, whether an informational advertisement will be deemed misleading by the Commissioners, advertisers will have a clear incentive to produce only fluff.

Under the standard followed by the FTC in this proceeding, even advertisements tested and found not to

mislead consumers may subject both the business that makes the advertised product, and all who assist in its advertising, to liability if three Commissioners decide for themselves (and by themselves) that the advertisement is somehow misleading. Advertisers therefore must live with the considerable risk that they will be subject to the possibility of burdensome injunctive orders and substantial fines if the Commission, based solely on its own reading, finds an advertisement misleading.

That uninviting prospect will lead to advertisements that are as "risk-free" as possible. Unable to predict the Commissioners' views, and unable to rely on their own consumer copy tests, businesses will avoid making statements

in any advertisements that could possibly be interpreted as containing an implied false assertion. "[O]ne response to such uncertainty is to encourage conservative copywriters to make a variety of corrective disclosures. On the other hand, an equally likely response is to discourage advertisers from providing certain types of information concerning the product . . . ." Schmidt & Burns, Proof or Consequences: False Advertising and the Doctrine of Commercial Speech, 56 U. Cin. L. Rev. 1273, 1281 (1988). To do so, of course, advertisers may have to strip their advertisements of much substantive content. "Some companies . . . are hesitating to make even legitimate . . . claims for fear of prompting federal . . . investigations." Landler, Schiller & Smart, Suddenly,

Green Marketers Are Seeing Red Flags, Bus. Wk., Feb. 25, 1991, at 74. See also id. ("until the regulatory chaos is cleared up, marketers are not likely to do much" "selling" or "telling" about the environmental attributes of their products).

When members of the advertising community adopt this approach, manufacturers of superior products lose the ability to present the facts establishing their superiority, thereby reducing product differentiation and injuring competition. As this Court has stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Clearly, the FTC's adoption of a rule that chokes off the flow of useful information injures not only the advertising community, but consumers as well.

If advertisers shift from providing factual information to running advertisements presenting only "'soft' information (often called 'puffing') and lifestyle-type campaigns," the resulting advertisements will "provide little assistance to consumers in purchasing decisions." Schmidt & Burns, supra, at 1293. As Judge Manion stated in his concurrence, this Court "has recognized that a free flow of information is indispensable to decisionmaking in the

free enterprise system . . . [and] the FTC jeopardizes this flow." Pet. App. 27a (citation omitted).

C. The FTC's Own Comments Underscore The Scope And Importance Of This Issue.

In a speech delivered shortly after the Commission decided this case, Chairman Steiger emphasized both the importance of the ruling and the fact that it would serve as a blueprint for the FTC's future activities. See Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991). Chairman Steiger, characterizing the case as "important," id. at 4, and "[o]f particular significance," id. at 2, stated that the FTC's opinion "is a clear statement of the Commission's approach to evaluating implied claims," which she

noted is "the central question of many advertising cases." Id. at 4. Similarly, in a recent article, Commissioner Dennis Yao of the FTC discussed at length the "important issue" whether extrinsic evidence should be received in implied false message cases. Yao & Van Anh Vecchi, Information and Decisionmaking at the Federal Trade Commission, 11 J. Pub. Pol'y & Marketing, Fall 1992, at 1. Commissioner Yao's discussion of Commission policy and practice in such cases focussed heavily on the FTC's opinion in this proceeding. See id. at 2-3.[3]

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[3] The import of the case has not gone unnoticed by the press. See, e.g., Kent, The "Kraft" Case: Symbol of FTC Activity, N.Y. L.J., June 21, 1991, at 3; Landler, Schiller & Smart, Bus. Wk., Feb. 25, 1991, at 74.

The advertising community, which amici represent, is extremely troubled by the FTC's ruling and deeply concerned about the impact that that decision will have on the business of advertising. Amici must work within the regime the FTC creates. The present rule of Kraft makes it nearly impossible to predict when the Commission will deem an advertisement to contain an implied message, and therefore will lead advertisers to shun informational advertisements and favor "puff" messages instead. The resulting drop in useful information will harm not only the advertising community, but the very consumers in whose interest the Commission purports to act.

CONCLUSION

For the reasons set forth above, the A.A.A.A., A.A.F. and A.N.A. respectfully request that this Court grant the

petition for a writ of certiorari to review the Seventh Circuit's decision.

Dated: New York, New York
December 23, 1992

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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23 pp

QUESTIONS PRESENTED

1. Whether, under this Court's decisions in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 496 U.S. 91 (1990), a court of appeals must exercise independent, *de novo* review of the Federal Trade Commission's finding that commercial speech is misleading and therefore unprotected by the First Amendment.

2. Whether the FTC may rely solely on its own reading of an advertisement in determining that an ad that is true on its face nonetheless conveys an implied misrepresentation to members of the public, or instead must base its determination on reliable extrinsic evidence of the public's understanding of the ad.

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court as well as other state and federal courts in cases dealing with commercial free speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, No. 91-1200, *cert. granted*, 112 S. Ct. 1290 (1992); *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 110 S. Ct. 2281 (1990);

Pacific Gas and Electric Co. v. Public Utility Com'n of California, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Com'n*, 447 U.S. 530 (1980).

WLF believes that permitting the free flow of commercial information is in the best interests of consumers because it facilitates informed consumer choices. To the extent that any such information is thought by some individuals to be misleading, those individuals ought to respond by providing additional information designed to correct the record, not by seeking to suppress the original information. WLF also believes that the success of our free enterprise system depends on the freest possible flow of commercial speech.

WLF is alarmed by the increasing tendency of federal and state regulatory officials to view their preferences regarding the optimal manner of presenting commercial information to the consuming public as the *only* acceptable manner of presentation. Such officials routinely label commercial information presented in other manners as "misleading" and thereby attempt to evade constitutional challenge to their edicts. Accordingly, WLF believes it is critical that the courts jealously guard their function as the final arbiter of First Amendment rights and not casually defer to agency findings that have the effect of limiting those rights.

WLF believes that its experience in litigating issues of this sort may prove of assistance to the Court in its consideration of this Petition. WLF submits this brief on behalf of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of judicial economy, WLF hereby adopts by reference the Statement contained in the Petition for Writ of Certiorari.

In brief, this case involves an attempt by Respondent Federal Trade Commission ("FTC") to suppress television and print advertisements prepared by Petitioner Kraft, Inc. ("Kraft") for its Kraft Singles American Pasteurized Process Cheese Food ("Singles"). The FTC contends that two sets of advertisements for Singles violate the Federal Trade Commission Act (the "Act"), 15 U.S.C. §§ 41 *et seq.* In particular, the FTC contends that the Singles advertisements constituted "unfair or deceptive" acts in violation of § 5 of the Act and "false advertisement" in violation of § 12 of the Act. 15 U.S.C. §§ 45, 52.

The advertisements in question highlight two facts: that Singles are made from milk and are a good source of calcium. Both sets of advertisements note that each 3/4 ounce slice of Kraft Singles is made from 5 ounces of milk. One of the two sets of advertisements goes on to note that "imitation" cheese slices (which compete with Kraft Singles) are made from little or no milk. Each of those claims is accurate.

The FTC contends, however, that each of the advertisements *implies* claims that are not true. The FTC contends that both sets of advertisements imply that each slice of Kraft Singles contains as much calcium as 5 ounces of milk when, in fact, it contains only 70% as much calcium (because roughly 30% of the calcium contained in the milk is lost during processing). The FTC further contends that the set of advertisements that mentions imitation cheese slices falsely implies that Kraft Singles contain more calcium than imitation cheese slices when, in fact, they contain roughly equivalent amounts of calcium.

Prior to disseminating the advertisements in question in 1985, Kraft hired two consumer survey organizations to conduct tests to determine what messages consumers took away from the advertisements. Those tests determined that consumers did not take away any false messages from the advertisements. Nonetheless, when a group known as the Center for Science in the Public Interest (CSPI)

complained to Kraft that the advertisements implied that each slice of Singles contains as much calcium as 5 ounces of milk, Kraft edited its advertisements to ensure that consumers would not draw that inference.[1]

Despite those edits, CSPI proceeded to complain to the FTC that some of the Kraft Singles advertisements were misleading, and the FTC began an investigation in January 1986. Kraft then hired a third research organization to determine whether the complaints had any merit. That organization's consumer survey, in order to make that determination, asked whether the advertisements made any comparisons to any other products. An average of only 3% of survey respondents inferred from the advertisements that Singles contain as much calcium as 5 ounces of milk (the "milk equivalency" claim), and an average of only 6.3% inferred that Singles contain as much calcium as imitation slices (the "imitation superiority" claim).

Nevertheless, the FTC issued a complaint on June 17, 1987, charging that both sets of advertisements in question were unlawful because they impliedly made the "milk equivalency" and the "imitation superiority" claims. Petition Appendix ("Pet. App.") 35a. An administrative law judge found against Kraft on those charges, and the FTC affirmed the ALJ in significant part, holding (among other things) that the Singles advertisements were actually misleading. Pet. App. 36a, 37a. The FTC issued a cease and desist order that forbade Kraft from making either the "milk equivalency" or the "imitation superiority" claims with respect to any cheese or imitation cheese product. Pet. App. 30a.

Kraft sought review of the cease and desist order in the United States Court of Appeals for the Seventh Circuit. Rejecting Kraft's request to conduct a *de novo* review of

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[1] For example, Kraft added a subscript to some of the advertisements stating that "one 3/4 ounce slice has 70% of the calcium of five oz. of milk."

the FTC findings that the Kraft advertisements were misleading, the Seventh Circuit held that review of FTC findings should be limited to "the highly deferential, substantial evidence test." Pet. App. 7a-9a. The Seventh Circuit held that the FTC findings were supported by substantial evidence and thus enforced the cease and desist order. Pet. App. 10a-18a. The Seventh Circuit rejected Kraft's argument that the FTC may not rely *solely* on its own reading of advertisements in concluding that they are misleading when, as here, the company producing the advertisements has conducted consumer surveys that concluded that the advertisements are not misleading. *Id.*

REASONS FOR GRANTING THE PETITION

Ever since *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court has recognized that commercial speech -- that is, speech that "proposes a commercial transaction" -- is entitled to significant First Amendment protection. *Virginia State Board of Pharmacy* at 770. The "free flow" of such speech is deemed worthy of protection because it is "indispensable to the proper allocation of resources in a free enterprise system" as well as to "the formation of intelligent opinions as to how that system ought to be regulated or altered." *Id.* at 765.

In *Central Hudson Gas & Electric Corp. v. Public Service Com'n of New York*, 447 U.S. 557 (1980), the Court laid down guidelines regarding the extent to which the government may regulate commercial speech without running afoul of First Amendment free speech guarantees. The government may absolutely ban commercial speech that promotes an illegal activity or is actually misleading. Speech that is not actually misleading but has the potential for being so may be regulated only upon a showing that: (1) the government has a "substantial" interest that is seeks to achieve; (2) the regulation directly advances the asserted interest; and (3) the regulation is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

Yet, in the 16 years since *Virginia State Board of Pharmacy* was handed down, the FTC has displayed little recognition that its regulation of commercial speech under the Federal Trade Commission Act is constricted by the First Amendment. The FTC appears to have been operating under the misguided notion that commercial speech it deems "unfair or deceptive" is by definition entitled to no First Amendment protection -- regardless how expansively the FTC chooses to define the term "unfair and deceptive." WLF urges the Court to hear this case in order to clarify the First Amendment limitations on the FTC's enforcement powers, both because that is an issue over which the courts of appeals are divided and because the FTC itself has shown little interest in conforming its conduct to First Amendment limitations.

I. COURTS SHOULD APPLY *DE NOVO* REVIEW TO FTC DECISIONS HOLDING THAT COMMERCIAL SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT

As the Court recognized in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), in cases raising First Amendment issues "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286 (1964)). Despite that admonition, the Seventh Circuit in reviewing the FTC's findings regarding the Kraft advertisements felt bound by the "highly deferential, substantial evidence test." Pet. App. 7a. Supreme Court review of that Seventh Circuit holding is warranted both because the courts of appeals are divided regarding the proper standard of review in such cases and because the Seventh Circuit's holding is contrary to *Bose* and opens the door to substantial FTC intrusion onto First Amendment rights.

Both the Seventh Circuit and the D.C. Circuit (in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (1985)) have declined to extend *Bose* (which involved appellate review of a finding that a libel-suit defendant's false statements in a magazine article were uttered with "actual malice") to the commercial speech context. However, two other courts of appeals (the Fifth and Eleventh Circuits) reached the opposite conclusion in determining that *Bose* requires *de novo* appellate review of findings that commercial speech is undeserving of First Amendment protection. *See Don's Porta Signs, Inc. v. City of Clearwater*, 928 F.2d 1051, 1053 n.9 (11th Cir. 1987)(*Bose* requires *de novo* review of district court determination that city government's justifications for regulating portable commercial signs met *Central Hudson* standards); *Lindsay v. City of San Antonio*, 821 F.2d 1103, 1107-1108 (5th Cir. 1987)(same).

Moreover, the Court's recent decision in *Peel v. Attorney Registration and Disciplinary Com'n of Illinois*, 110 S. Ct. 2281 (1990), makes clear that the Seventh Circuit erred in holding -- contrary to the Fifth and Eleventh Circuits -- that *Bose* does not extend into the realm of commercial speech. *Peel* involved an attempt by Illinois bar authorities to discipline an attorney for placing on his attorney letterhead a statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy (NBTA).[2] Although acknowledging that the letterhead statement constituted commercial speech, the Court nevertheless held (citing *Bose* as authority) that prior findings that the letterhead was actually misleading were subject to *de novo* review. *See Peel*, 110 S. Ct. at 2291-2292 (plurality opinion)("Whether the inherent character of a statement places it beyond the protection of the First

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[2] Illinois bar authorities argued that Mr. Peel's letterhead statement -- although literally true -- was "actually misleading" because, *inter alia*, the general public could reasonably believe that the NBTA was a state-sanctioned body and that Mr. Peel was entitled to "practice in the field of trial advocacy solely because he is certified by the NBTA." *In re Peel*, 126 Ill.2d 397, 534 N.E.2d 980, 984 (1989).

Amendment is a question of law over which Members of this Court should exercise *de novo* review. Cf. *Bose* . . ."); *id.* at 2293-2296 (Marshall, J., concurring in judgment).

The Seventh Circuit's attempts to distinguish *Peel* are unavailing. The Seventh Circuit argued that an appellate court's obligation to provide *de novo* review of First Amendment-related findings does not extend to findings of administrative agencies, which may have special expertise (lacking in a trial court) in making such findings. Pet. App. 8a-9a. That argument finds no support in either *Bose* or *Peel*, which were categorical in their statements that appellate courts should safeguard free-speech rights by providing *de novo* review of any finding that a statement is unprotected by the First Amendment. Indeed, *Peel* itself involved findings by an administrative body (Illinois's Attorney Registration and Disciplinary Commission), which presumably has developed considerable expertise in dealing with deceptive advertising by attorneys; yet this Court was unwilling to defer to findings that Mr. Peel's letterhead statement was "actually misleading" and thus unprotected by the First Amendment.

Moreover, the Seventh Circuit's opinion undercuts any serious claim by the FTC that its five commissioners have any special expertise in the field of deceptive advertising that would justify a special deference rule in First Amendment cases. The Seventh Circuit admitted:

> Indeed, proof of the FTC's inexperience abounds: false advertising cases make[] up a small part of the Commission's workload, *see* Glen E. Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor*, 24 Fed. B.J. 548, 571 (1964), most commissioners have little prior experience in advertising, *see* Paul H. LaRue, *FTC Expertise: A Legend Examined*, 16 Antitrust Bull. 1 (1971), and the average tenure of commissioners is very brief. *See* Richard A. Posner, *The Federal Trade Commission*, 37 U.

Chi. L. Rev. 47, 86 (1969)(average tenure of four years).

Pet. App. 12a.

If anything, a finding that a statement is not protected by the First Amendment should be entitled to *greater* deference when made by a trial court than by an administrative agency. A trial court -- unlike some administrative agencies, such as the FTC, that sit as both prosecutor and fact-finder -- has no institutional bias on First Amendment issues and thus can lay a much stronger claim to being a neutral fact-finder. Moreover, a far more plausible case for a deferential standard of review can be made in cases, such as *Bose*, in which the question of whether the statement at issue is constitutionally protected turns on the credibility of a trial witness,[3] than in cases where, as here, the original fact-finder's decision was not based on witness-credibility determinations.

Finally, the Seventh Circuit's deferential standard of review would create radical disparities in First Amendment protections from state to state. Residents of states whose administrative agencies took an expansive view of what constitutes "misleading" speech would enjoy more limited First Amendment rights than residents of other states. Indeed, *Peel* cited the possible creation of disparate state-to-state First Amendment standards as one reason for declining to defer to Illinois's finding that Mr. Peel's letterhead statement was "misleading" and therefore

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[3] In *Bose*, the plaintiff alleged that the defendant's writer had acted with "actual malice" (i.e., knowledge of falsity or reckless disregard for the truth) in writing false statements about the plaintiff's product. Thus, the issue of liability turned on the writer's state of mind. The Court held that the appellate court properly afforded *de novo* review to the "actual malice" issue, despite the fact that only the trial judge had had an opportunity to view the writer's six days of testimony and thereby to judge his state of mind based on his demeanor at trial. *Bose*, 466 U.S. at 511; *id.* at 519-520 (Rehnquist, J., dissenting).

constitutionally unprotected. *Peel*, 110 S. Ct. at 2291 n.16.

The Seventh Circuit's second argument for distinguishing *Peel* is similarly unavailing. The court said that the issue in *Peel* was "whether a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading speech, passed constitutional muster," while this case involves "an administrative order applicable only to a single entity." Pet. App. 9a & n.3. The Seventh Circuit's purported distinction is factual inaccurate; both cases involved administrative action taken against a party based on alleged violation of a generally applicable rule (here, the Federal Trade Commission Act's prohibition against "unfair or deceptive" acts and, in *Peel*, an attorney disciplinary rule that prohibited lawyers from holding themselves out as "certified" or as "specialists").

Moreover, even if the Seventh Circuit's purported distinction were accurate, it would be a distinction without a difference. Indeed, the Seventh Circuit never even attempted to explain why the purported distinction should result in differing levels of appellate review. In sum, *Peel* is directly on point, and conflicts with the Seventh Circuit's conclusion that *de novo* review is inappropriate in this case. The Court should grant the writ of certiorari in order to address that conflict, as well as the conflict between the Seventh Circuit's decision and the decisions of the Fifth and Eleventh Circuits.

II. *DE NOVO* REVIEW IS WARRANTED IN LIGHT OF THE FTC'S RECORD OF FAILING TO HEED FIRST AMENDMENT RIGHTS

WLF is particularly concerned that FTC deceptive advertising findings be subjected to *de novo* review because the FTC's conduct over the past decade indicates that it believes itself unencumbered by First Amendment restrictions on commercial speech regulation. Statements made by the FTC in its decision in this case indicate a

lack of understanding of First Amendment case law. That misunderstanding must inevitably infect FTC findings that certain advertisements are sufficiently "misleading" as to be deprived of all First Amendment protection. Accordingly, arguments that might otherwise support judicial deference to FTC First Amendment-related findings must give way here in light of the FTC's demonstrated inability to deal adequately with First Amendment issues. Granting Kraft's certiorari petition would allow the Court not only to establish the proper appellate standard of review in FTC cases but also to correct the FTC's misapplication of First Amendment case law.

The FTC apparently misunderstands *Central Hudson*'s holding that commercial speech that is "actually" or "inherently" misleading is subject to absolute prohibition in all cases. The FTC found that Kraft's advertisements were "deceptive," equated a finding of deceptiveness with a finding of "actually misleading" for *Central Hudson* purposes, and thus concluded that *Central Hudson* permitted the FTC to end its constitutional analysis at that point. Pet. App. 69a-70a. The flaw in the FTC's analysis is that what the FTC historically has meant by "deceptive" advertising and what this Court's commercial speech decisions have meant by "actually" or "inherently" misleading commercial speech are entirely different concepts.

The FTC historically has defined a "deceptive" advertisement as one that "reasonably can be interpreted in a misleading way." Pet. App. 39a n.8. The FTC includes advertisements within its definition of "deceptive" even when non-misleading interpretations are at least as possible as a misleading one. *Id.* Indeed, an advertisement is "deceptive" even if only a "significant minority" of reasonable consumers is misled thereby. Pet. App. 41a. Moreover, the FTC does not require evidence that *anyone* was actually misled by an advertisement before the advertisement can be branded "deceptive." Pet. App. 57a.

As so defined, the FTC's definition of a "deceptive" advertisement is significantly broader than this Court's concept of "actually or inherently misleading" commercial speech that can be prohibited in all circumstances. The Court made clear in *Peel* that commercial speech that contains no express, demonstrably false terms can never be labeled "actually" or "inherently" misleading in the absence of evidence that someone was actually misled by the speech. *Peel*, 110 S. Ct. at 2290 (plurality opinion); *id.* at 2293 (Marshall, J., concurring in judgment).[4] The Court has, of course, permitted regulation of commercial speech that is "potentially misleading"[5] even though not "actually" or "inherently" misleading; but in those circumstances, no regulation is permitted unless the regulator can meet each of the other three requirements laid down in *Central Hudson*: the government has a "substantial" interest that it seeks to achieve; the regulation directly advances the asserted interest; and the regulation is no more extensive than necessary to serve that interest.

The FTC has avoided ever having to address the last three *Central Hudson* requirements by decreeing that all advertising that meets its definition of "deceptive" also meets this Court's definition of "actually" or "inherently"

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[4] The Court has never defined precisely what percentage of reasonable consumers must be misled by an advertisement before it will be found to be "actually" or "inherently" misleading. There is some indication in *Central Hudson* that an advertisement is "actually" or "inherently" misleading if a majority of consumers are misled thereby. *See Central Hudson*, 447 U.S. at 563 ("The government may ban forms of communication more likely to deceive the public than to inform it") (citing *Friedman v. Rogers*, 440 U.S. 1, 13, 15-16 (1979)).

[5] Commercial speech is said to be "potentially misleading" when -- although it is not "inherently misleading" because it does not convey a false message to most listeners -- "a person reasonably could draw" an incorrect inference from the speech. *Peel*, 110 S. Ct. at 2295 (Marshall, J., concurring in judgment).

misleading (and thus is subject to summary prohibition).[6] Yet, even a cursory examination of the FTC's definition of "deceptive" speech reveals that much of the speech so classified would be termed "potential misleading" by the Court. For example, as noted above, the FTC labels "deceptive" any speech that reasonably could be interpreted in a misleading way (Pet. App. 39a n.8), but the Court terms such speech only "potentially misleading" if it is generally interpreted in a non-misleading way. *Peel*, 110 S. Ct. at 2295 (Marshall, J., concurring in judgment). Accordingly, the FTC's position that it is empowered to prohibit all speech that meets its definition of "deceptive" is a clear violation of *Central Hudson*.[7]

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[6] After finding that the only speech at issue in this case was "either expressly or impliedly false or deceptive" and thus unprotected under the First Amendment, the FTC added: "We find that the record in this case establishes a reasonable fit between the violations found and the scope of the order's prohibitions. *See Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3033-35 (1989)." Pet. App. 70a. Accordingly, the FTC may attempt to argue that -- although not actually required to do so (because Kraft's advertisements were inherently misleading) -- it nonetheless justified its conduct under *Central Hudson* standards applicable to commercial speech that is merely "potentially misleading." Any such claim would be untenable. First, the quoted sentence addressed only one of the three *Central Hudson* factors. Second, the sentence makes clear that the FTC was addressing that factor based on the premise that Kraft's advertisements were "actually misleading." Accordingly, the FTC cannot be said to have conducted an alternative constitutional analysis based on the premise that Kraft's conduct was merely "potentially misleading" rather than "actually misleading."

[7] The FTC is not alone in attempting to label all commercial speech of which it disapproves "inherently misleading" and thereby to avoid application of the *Central Hudson* test. Indeed, that is precisely what happened in *Peel*. Illinois branded Mr. Peel's letterhead statement as "actually misleading" and claimed that because of that classification, it was under no obligation to meet the *Central Hudson* requirements before banning Mr. Peel's speech. The Court rejected that attempt to bypass *Central Hudson*. It said that commercial speech could not be labeled as "actually misleading" in the absence of evidence that anyone was actually misled by the speech. *Peel*, 110 S. Ct. at 2290. WLF asks the Court to grant review in this case to make

(continued...)

In sum, while the FTC may have considerable experience in dealing with deceptive advertising cases, it clearly lacks an informed understanding of commercial speech doctrine sufficient to justify judicial deference to any FTC findings regarding First Amendment-related issues. The Court should grant the certiorari petition in this case to correct the Seventh Circuit's ill-considered decision to the contrary.

III. THE FTC ERRED IN FINDING AN FTC ACT VIOLATION IN THE FACE OF SURVEY EVIDENCE THAT CONSUMERS WERE NOT DECEIVED

Although it conducted no surveys to determine what messages consumers drew from Kraft's advertisements, the FTC determined that the advertisements were deceptive based "on its own impression of the advertisements." Pet. App. 6. While WLF would concede that there are cases in which the deceptive nature of an advertisement is so apparent from its face that the FTC should not be required to produce extrinsic evidence to support a finding of an FTC Act violation, that will never be the case when, as here, the only available consumer-based information indicates that consumers are *not* misled by the advertisements in question. WLF is fearful that permitting the FTC to find violations of the Act in such cases will significantly chill commercial speech and thereby deprive consumers of valuable information. Accordingly, WLF asks the Court to grant certiorari in this case in order to eliminate what it views as a serious threat to First Amendment rights.

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[7] (...continued)
clear to administrative agencies that unsubstantiated findings that commercial speech is "inherently misleading" may not be used as a device to avoid having to make the difficult showings normally required before non-misleading commercial speech may be regulated.

The Seventh Circuit cited *Zauderer v. Office of Disciplinary Council of Supreme Court of Ohio*, 471 U.S. 626 (1985), in support of the FTC's decision to sanction Kraft even in the absence of consumer survey evidence suggesting that anyone was deceived by Kraft's advertisements. The Seventh Circuit read too much into *Zauderer*. The Court held that "[w]hen the possibility of deception is as self-evident" as it was with the attorney advertising in that case,[8] the First Amendment does not require a state regulator to conduct consumer surveys in order to establish the advertisement's tendency to deceive. *Zauderer*, 471 U.S. at 652-653. *Zauderer* held no more than that where the misleading nature of the speech at issue is beyond reasonable dispute, evidence that consumers were actually deceived need not be produced before the speakers may be sanctioned. It left open the question of how courts go about determining that the speaker is being unreasonable in protesting that his speech was not misleading.

WLF cannot supply the Court with an easily-applied test that will distinguish those (relatively rare) forms of commercial speech that, while containing no demonstrably false assertions, make implied claims that are self-evidently misleading, from those forms of commercial speech that make no such claims. Nonetheless, *Peel* makes clear that the general rule is that commercial speech containing no express, demonstrably false terms should not be deemed inherently misleading in the absence of evidence that some consumers were actually misled. *Peel*, 110 S. Ct. at

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[8] In *Zauderer*, an attorney had run advertisements that disclosed his availability for contingent fee lawsuits and stated that "if there is no recovery, no legal fees are owed by our clients," thereby leaving the (false) impression that the client would owe nothing if his lawsuit were unsuccessful. *Zauderer*, 471 U.S. at 652. The Court noted that most nonlawyers use the terms "legal fees" and "costs" interchangeably and would not appreciate that while unsuccessful plaintiffs rarely are liable for the former, they are almost always liable for the latter. *Id.*

2290.[9] The "self-evidently misleading" exception to that general rule would quickly swallow the general rule if it were found to apply even in situations, as here, where the only existing consumer surveys conclude that few, if any, consumers were misled. Accordingly, while there undoubtedly are a few extreme cases in which the self-evidently misleading nature of the claims implied by an advertisement should permit the suppression of commercial speech even in the absence of extrinsic evidence that some consumers were misled, this case -- in which the only available consumer survey information indicates that few, if any, consumers were misled -- clearly is not one such case.

The Seventh Circuit's "solution" to the problem of how to discern when an advertisement contains implied claims that are self-evidently misleading is no solution at all. The Seventh Circuit would affirm the FTC's finding of deceptive advertising, even in the absence of extrinsic evidence of deception, whenever the reviewing court agrees with the FTC that the implied claims are "reasonably clear" from the face of the advertisement. Pet. App. 16a. But all the Seventh Circuit's standard does is to add the views of three judges to those of several FTC commissioners; three judges are in no better position than the commissioners to second-guess consumer surveys that indicate that consumers are not deceived.[10]

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[9] Indeed, even the Seventh Circuit admitted, "[T]he extensive body of commentary on the subject makes a compelling argument that reliance on extrinsic evidence should be the rule rather than the exception." Pet. App. 16a.

[10] For the record, it is the view of WLF's attorneys -- who have no direct interest in this lawsuit -- that the Kraft advertisements convey neither the "milk equivalency" nor the "imitation superiority" claims. We find absurd the FTC's suggestion that consumers buy Kraft Singles because they have been misled into believing that one slice of Kraft Singles contains the same amount of calcium as 5 ounces of milk, when (as the FTC found -- Pet. App. 58a n.22) 98% of consumers have no idea how much calcium is in 5 ounces of milk. Consumers

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There is no doubt that commercial speech will be chilled if the FTC's cease and desist order is allowed to stand. Businesses that are hit with such orders face significant negative consequences -- both due to the negative publicity attendant to being labeled as the purveyor of misleading advertisements, and because a business that has been found once to be in violation of the FTC Act faces severe monetary sanctions if later cited for a second violation. Accordingly, businesses will react to this decision by decreasing the number of advertisements that make objectively verifiable claims (whether express or implied) about a product. Instead, they will concentrate increasingly on "feel good" advertising that provides little useful information to consumers but that is effective in increasing sales (through increased name recognition) and that is generally safe from FTC challenge. As Judge Manion observed in his concurring opinion below, businesses will be reluctant to engage in comparative advertising if the Seventh Circuit's decision is allowed to stand, because now even a pre-dissemination survey of consumers showing that consumers are not deceived by a particular ad is no assurance that the FTC will not subsequently make a contrary finding. Pet. App. 27a.[11]

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[10] (...continued)
who buy Singles after seeing the disputed ads will do so because they have been led to believe (correctly) that Singles are a good source of calcium, not because they believe that each slice will give them a specified percentage of their daily calcium needs.

Of course, the views of WLF's attorneys regarding whether Kraft's ads convey implied claims that will mislead a sizeable number of consumers are not particularly relevant, because WLF has not conducted any consumer surveys on that issue. But then again, the views of five commissioners and three appellate judges who also have conducted no consumer surveys are equally irrelevant in the face of survey results showing that consumers were not deceived.

[11] WLF finds particularly disturbing the FTC's decision to term Kraft a "deliberate" FTC Act violator -- and to cite that deliberateness as justification for its broad cease and desist order -- based on Kraft's (continued...)

Businesses may be able to minimize their injury flowing from this decision, since they are likely to find alternative ways to market their products. It is consumers -- who will be denied valuable information regarding products in the marketplace -- who will suffer most. The First Amendment protects not only the speaker but also those who wish to receive information. *Virginia State Board of Pharmacy*, 425 U.S. at 756. Thus, while the Court should grant the petition for a writ of certiorari in order to determine whether the chilling effects on commercial speech caused by the FTC's decision in this case violates Kraft's First Amendment rights, it is the detrimental effect that this case could have on the First Amendment rights of consumers that makes this case particularly important.

CONCLUSION

For the foregoing reasons, WLF respectfully submits that the petition should be granted.

Respectfully submitted,

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[11] (...continued)
decision to defend its right to speak freely in the face of criticism from CSPI and the FTC staff. Pet. App. 67a-68a. There is no surer way to chill commercial speech in this country than to target for severest sanction those companies that fail to kowtow to the informal demands of government bureaucrats or to the complaints of self-appointed guardians of the public interest.

(5)
Court, U.S.
JAN 11 1993

No. 92-744

In the Supreme Court of the United States

OCTOBER TERM, 1992

KRAFT, INC.,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. THE SEVENTH CIRCUIT'S REFUSAL TO APPLY INDEPENDENT REVIEW CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

As we explained in the Petition, certiorari is warranted to review the Seventh Circuit's decision that the "independent review" standard does not apply to commercial speech cases. That decision directly conflicts with the decisions of the Fifth and Eleventh Circuits and is starkly inconsistent with this Court's statements in *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984), and *Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

A. The Commission first contends (Br. 12-15) that neither *Bose* nor *Peel* mandates the application of independent review in commercial speech cases. This contention is beside the point. We have never maintained that *Bose* or *Peel* definitively settled the issue. Indeed, it is the very lack of a dispositive statement from this Court that has led to the division in the circuits and that warrants granting certiorari in this case.

Still, *Bose* and *Peel* do strongly indicate that independent review is required in commercial speech cases. The Commission's assertion (Br. 13) that *Bose* actually suggests the opposite is based on a clear misreading of that case. *Bose* does *not* suggest that independent review is unnecessary in commercial speech cases because truthful commercial speech is less susceptible to chilling than other forms of speech. Rather, *Bose* mentions the diminished danger of a chilling effect only to explain why *false* commercial speech in general constitutes an unprotected category of speech. 466 U.S. at 504 n.22. The context of the Court's discussion of commercial speech strongly indicates that independent review is necessary to determine whether *particular* commercial speech falls within that unprotected category -- *i.e.*, whether it actually is false or misleading. *Ibid.* See Pet. 15.[1]

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[1] Indeed, this reading of *Bose* is bolstered by the Court's treatment of the other category of "unprotected" speech mentioned in footnote 22 of the Court's opinion -- "[s]tatements made by public employees in their

(continued...)

The Commission also mischaracterizes this Court's decision in *Peel*. While not disputing that *Peel* was a commercial speech case, the Commission contends (Br. 14, 19 n.14) that the Court applied *de novo* review only to the factfinders' *legal* conclusion that the attorney's advertisement was misleading, and not to any *factual* findings of actual deception. In fact, although the Court noted that neither the state agency nor the state supreme court had made any factual findings of "actual deception," the Court simply meant that there was no evidence that "any potential client or person was actually misled or deceived" by the advertisement. 496 U.S. at 100-101 (plurality opinion); *id.* at 111-112 (Marshall, J., concurring). The state agency and court nonetheless found that the ad was misleading because they thought consumers might derive false implications from it, see *In re Peel*, 534 N.E.2d 980, 984, 986 (Ill. 1989), and this Court subjected that finding to *de novo* review. 496 U.S. at 101-108 (plurality opinion).[2] Whether that finding was one of "law" or of "fact," it was precisely analogous to the FTC's findings about Kraft's ads in this case.

The Commission also argues more broadly (Br. 19-20) that *Bose* and *Peel* require independent review only of the "ultimate"

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[1] (...continued)
employment capacity and not touching on matters of public concern." 466 U.S. at 504 n.22. In *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the Court, citing *Bose*, held that independent review was required to determine whether a public employee's statements dealt with a matter of public concern. *Id.* at 386 & n.9. It is evident, then, that the *Bose* footnote listed categories of speech that warranted independent review.

[2] Although neither Justice Marshall's nor Justice White's separate opinion cited *Bose*, it is evident that each Justice also engaged in independent review of the record to determine whether the ad made misleading implied claims. See, *e.g.*, 496 U.S. at 112-113 (Marshall, J., concurring in the judgment) (finding that the ad was potentially misleading because the reference to the "National Board of Trial Advocacy" could falsely imply that the NBTA was a government agency or sanctioned by the states); *id.* at 118 (White, J., dissenting) (agreeing with Justice Marshall's findings but disagreeing as to proper remedy). Even the Seventh Circuit acknowledged that Justice Marshall, as well as the plurality, engaged in independent review in *Peel*. Pet. App. 8a.

question whether an ad is deceptive (which the Commission calls a question of "constitutional fact[ ]"), and not of the "subsidiary" question whether the ad makes a particular misleading claim (which the Commission calls "a question of pure or historical fact"). This argument is completely nonsensical. The question whether an ad makes a particular misleading claim is inseparable from -- and, indeed, determinative of -- the question whether the ad is deceptive and therefore unprotected by the First Amendment.[3] Whether an ad makes an alleged misleading claim is therefore precisely the sort of question that requires independent review under this Court's precedents.[4]

Moreover, even if the question whether an ad makes a particular misleading claim were somehow "subsidiary" to the question whether the ad is deceptive, this Court's precedents indicate that this question is still subject to independent review. Thus, in *Rankin* v. *McPherson*, 483 U.S. 378 (1987), the Court

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[3] This is especially true where, as here, both parties agree that the alleged claim, if made, is false, and disagree only as to whether the ad actually makes that claim. Indeed, the Commission acknowledges that the question whether an ad makes the alleged misleading claim is determinative of First Amendment protection when it states (Br. 21) that independent review of the ultimate conclusion of deceptiveness would be an "empty formality" if a reviewing court deferred to the finding that the ad makes an alleged claim. For this reason, the Commission's suggestion (Br. 16-17 n.11) that the question presented here is somehow broader than the argument we made in the court of appeals is plainly incorrect.

[4] See, *e.g.*, *Rankin*, 483 U.S. at 385-387 (examining independently whether public employee's remarks dealt with matter of public concern); *Peel*, 496 U.S. at 101-108 (plurality opinion) (whether attorney's advertisement conveyed misleading implications); *Bose*, 466 U.S. at 511-514 (whether defendant in libel case acted with "actual malice"); *Hess* v. *Indiana*, 414 U.S. 105, 108-109 (1973) (per curiam) (whether advocacy was directed to inciting imminent lawless action); *Miller* v. *California*, 413 U.S. 15, 25, 30 (1973) (whether sexually explicit material appealed to "prurient interest" and was "patently offensive"); *Street* v. *New York*, 394 U.S. 576, 592 (1969) (whether remarks were "so inherently inflammatory" as to be "'likely to provoke the average person to retaliation'") (citation omitted).

stated that "any factual findings subsumed in the 'public concern' determination are subject to constitutional fact review." *Id.* at 385 n.8. Similarly, in *Bose*, the Court held that all factual findings "which relate to the actual-malice determination must be independently assessed." 466 U.S. at 514 n.31. In this case, then, any factual findings that relate to the question whether the ads were deceptive -- including the FTC's finding that the ads made the alleged claims -- must be subject to independent review.

B. Despite the Commission's misreading of those cases, then, *Bose* and *Peel* strongly suggest that independent review applies to commercial speech cases. But because neither case definitively resolved the issue, the courts of appeals have reached conflicting conclusions. See Pet. 13-14. Only a dispositive statement from this Court will dispel the confusion in the lower courts.

The FTC seeks (Br. 16-18) to refute the existence of a circuit split by distinguishing the decisions of the Fifth and Eleventh Circuits. These purported distinctions, however, are either inaccurate or irrelevant. Thus, the Commission contends (Br. 16) that *Lindsay* v. *City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987), cert. denied, 484 U.S. 1010 (1988), was not a commercial speech case because the city's ban on portable signs affected commercial and non-commercial speech equally. But it is clear that the ban principally affected commercial speech. See, *e.g.*, 821 F.2d at 1111 & n.15 (noting that "other modes of advertising" were available to persons who relied on portable signs and that city ordinance contained special exemptions for non-commercial speech); *Lindsay* v. *City of San Antonio*, No. SA-86-CA-636, slip op. at 3 (W.D. Tex. Aug. 13, 1986) ("[p]laintiffs contend that the portable sign ordinance violates the First Amendment by unduly prohibiting commercial speech").[5]

Moreover, in deciding to apply independent review, the court in *Lindsay* relied on its earlier decision in *Dunagin* v. *City of Oxford*, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259

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[5] See also *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (citing *Lindsay* as support for application of independent review to commercial speech cases), cert. denied, 485 U.S. 981 (1988).

(1984), a "pure" commercial speech case involving a state's restrictions on liquor advertising. See *Lindsay*, 821 F.2d at 1108 & n.8. In *Dunagin*, the court independently examined the district court's factual findings in determining whether the restriction on commercial speech was justified. 718 F.2d at 749 n.8. *Lindsay* and *Dunagin* thus plainly demonstrate that the Fifth Circuit applies independent review in commercial speech cases.

The Commission admits that *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988), was a commercial speech case, but argues (Br. 16-17) that the Eleventh Circuit applied the *Bose* standard only to "mixed questions of law and fact" that involved "ultimate constitutional questions" -- whether the commercial speech regulation directly advanced the government's goals or was more extensive than necessary -- rather than to "subsidiary factual issues." Even if the Commission's characterization of the issue in *Don's Porta Signs* were accurate, however, it does not distinguish that case from this one in any relevant way. As discussed above (at page 3), the FTC's finding that Kraft's ads conveyed misleading implications is not a "subsidiary" finding, but is completely determinative of whether the ads were deceptive and therefore unprotected by the First Amendment.

In any event, the court in *Don's Porta Signs* explicitly stated that it "must make an independent examination of the *whole record*" in determining whether the regulation of commercial speech directly advanced the government's goals or was more extensive than necessary. 829 F.2d at 1053-54 n.9 (citing *Bose*, 466 U.S. at 499; *Lindsay*, 821 F.2d at 1107; and *Dunagin*, 718 F.2d at 748 n.8) (emphasis added). Thus, the court's determination of whether the regulation directly advanced the government's goals necessarily entailed independent review of all relevant factual findings in the record. See *id.* at 1053.

Finally, the Eleventh Circuit's decision in *Braun* v. *Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992), petition for cert. filed, No. 92-817 (Nov. 10, 1992), also clearly involved commercial speech -- a magazine advertisement for personal services by a "gun for hire." *Id.* at 1117. The court in *Braun* "subject[ed] to independent examination the jury's finding that [the]

ad, on its face, would convey to a reasonably prudent publisher that it created a clearly identifiable unreasonable risk that the advertiser was available to commit serious violent crimes." *Id.* at 1121.[6] The jury's finding in *Braun* was directly analogous to the FTC's finding at issue here in that both depended on analysis of the language of the advertisement to determine how a reader would interpret it. *Ibid.*

The Commission nevertheless argues (Br. 18) that *Braun* was somehow different because of the identity of the defendant. It characterizes *Braun* as standing for the narrow proposition that independent review applies only where the defendant is the *publisher* that conveyed the commercial speech rather than the advertiser himself.

This argument is preposterous. Nowhere in *Braun* did the Eleventh Circuit hold that independent review is limited to suits against a publisher of commercial speech. To the contrary, the court stated broadly that "the Supreme Court has held that, in cases involving First Amendment claims, an appellate court must undertake independent review of the record 'in order to make sure that "the [trial court's] judgment does not constitute a forbidden intrusion on the field of free expression."'" 968 F.2d at 1120 (citing *Bose*, 466 U.S. at 499, and *Don's Porta Signs*, 829 F.2d at 1053 n.9). Thus, both *Don's Porta Signs* and *Braun* make clear that the Eleventh Circuit applies independent review in commercial speech cases.

C. Finally, the Commission asserts (Br. 15 & n.9) that even if independent review applies to commercial speech cases, it should not apply to the FTC because of the Commission's "expertise" at determining when an ad is "deceptive." But the Commission utterly fails to explain why its determinations should be exempt from the First Amendment's requirement of independent review when the findings of other "expert" bodies do not enjoy such an

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[6] The Commission's contention (Br. 18 n.13) that the court in *Braun* "applied *de novo* review only to the ultimate question whether the publisher owed a legal duty under state law to the plaintiffs" is thus plainly incorrect.

exemption.[7] Instead, the Commission simply cites (Br. 15) this Court's statement in *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), that the Commission "is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [FTC] Act." But as we noted in the Petition (at page 17 n.7), *Colgate-Palmolive* was decided before the Court extended First Amendment protection to commercial speech, and also before *Bose* and *Peel*. That decision therefore cannot possibly stand for the proposition that the FTC is immune from the type of independent review that other administrative bodies, as well as courts, receive under the First Amendment. Certiorari should therefore be granted to determine the appropriate standard of review for FTC decisions that restrict commercial speech.

II. THE FTC'S RELIANCE ON ITS OWN REACTION TO KRAFT'S ADS TO FIND THAT THE ADS WERE IMPLICITLY MISLEADING WARRANTS THIS COURT'S REVIEW

Certiorari should also be granted to determine whether the FTC Act permits the Commission to find that an expressly truthful

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[7] See, *e.g.*, *Peel*, 496 U.S. at 108 (plurality opinion) (determination by state bar commission and state supreme court that attorney's letterhead was misleading subject to independent judicial review); *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985) (congressional determination that restrictions on campaign spending were necessary to prevent corruption or appearance of corruption); *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965) (determination by state agency responsible for regulating motion picture films that particular film was unprotected by the First Amendment); *NBC, Inc.* v. *FCC*, 516 F.2d 1101, 1122 (D.C. Cir. 1974) (FCC conclusion that broadcaster violated "fairness doctrine"), cert. denied, 424 U.S. 910 (1976); *A Quaker Action Group* v. *Hickel*, 421 F.2d 1111, 1117-18 (D.C. Cir. 1969) (Department of Interior's determination that demonstrations near White House posed danger to President); *Porter* v. *Califano*, 592 F.2d 770, 776-780 & n.15 (5th Cir. 1979) (determination by Department of HEW that an employee's speech was false and disrupted the agency's operations). See also *Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriguez*, 747 F. Supp. 836, 843 (D.P.R. 1990) (determination by territory's Department of Consumer Affairs that advertisement was misleading). See Pet. 15-16, 18.

advertisement is implicitly misleading based solely on its own reaction to the ad. The Commission's claim (Br. 21-22) that this case does not even provide an occasion to address this issue is absurd. The FTC's decision itself stated that it was based on the Commission's own reading of "the ads themselves," and that "resort to extrinsic evidence" was "unnecessary." Pet. App. 45a. See also *id.* at 50a, 51a.[8] The Seventh Circuit also stated that "[t]he Commission based all of these findings on its own impression of the advertisements and found it unnecessary to resort to extrinsic evidence." *Id.* at 6a. And, since the FTC's decision, two members of the Commission have publicly acknowledged that the Commission's decision did not rely on extrinsic evidence.[9] Now that its refusal to rely on extrinsic evidence is challenged before this Court, the Commission cannot suddenly claim that it *did* in fact rely on such evidence.

Similarly, the Commission's assertion (Br. 23 & n.18) that its practice under the FTC Act does not conflict with the practice of courts under the Lanham Act is plainly wrong. As the numerous cases and other authorities cited in the Petition (at pages 21-22) show, courts in Lanham Act cases almost universally require extrinsic evidence that consumers perceive the misleading claim allegedly implied by an ad. Indeed, the Seventh Circuit itself acknowledged that "[w]ere this a Lanham Act case, a reviewing

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[8] Although the Commission also noted that the weight of the extrinsic evidence was "consistent" with its determination, it is clear that the extrinsic evidence was not a basis for the Commission's decision. The Commission did not suggest that it considered this evidence sufficient to prove that the ads were misleading. Indeed, the Commission noted that its extrinsic evidence was flawed, and held that this evidence was only "of *some* probative value." *Id.* at 47a & n.13 (emphasis added).

[9] See Yao & Van Anh Vecchi, *Information and Decisionmaking at the Federal Trade Commission*, 11 J. PUB. POL'Y & MKTG., 1, 3 (Fall 1992) ("[t]he Commission simply examined the ad[s] and concluded that" they made the alleged claims, "without resort[ing] to extrinsic evidence"); Janet D. Steiger, Chairman, FTC, Remarks Before the American Advertising Fed'n Gov't Relations Conf. (Mar. 12, 1991) at 4 ("the Commission determined that it did not need to rely on extrinsic evidence to interpret" the ads).

court in all likelihood would have relied on extrinsic evidence of consumer perceptions." Pet. App. 12a. See also Gallo, *False and Comparative Advertising Under Section 43(a) of the Lanham Trademark Act*, 8 COMM. & L. 3, 24 (1986); Kent, *The "Kraft" Case: Symbol of FTC Activity*, N.Y. L.J., June 21, 1991, at 3.[10] For the reasons discussed in the Petition (at pages 22-24), the Commission's purported "expertise" does not justify the divergence between the Commission's practice under the FTC Act and courts' interpretation of the Lanham Act.

Finally, the Commission disputes (Br. 24) that its practice of relying on its own reading of ads will chill truthful, nonmisleading advertising, citing this Court's suggestion that regulation of false advertising normally poses only a minimal danger of such a chilling effect. But the notion that commercial speech is less susceptible to a chill from government regulation is premised on the assumption that advertisers can more easily distinguish between true and false claims than, for example, reporters or political commentators, and thus can make only true claims without fear of liability. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 772 n.24 (1976). But this assumption is valid only if advertisers actually know what claims their ads will be perceived as making. The problem with the Commission's approach to finding implied claims is that it makes it virtually

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[10] The three Lanham Act cases cited by the Commission (Br. 23 n.17) do not prove otherwise. *Johnson & Johnson* v. *GAC Int'l, Inc.*, 862 F.2d 975, 980 (2d Cir. 1988), involved a claim that the court found "facially false" -- *i.e.*, *expressly* misleading. The false claim in *Better Business Bureau, Inc.* v. *Medical Directors, Inc.*, 681 F.2d 397, 403 (5th Cir. 1982), while arguably implied, was inextricably tied to a false claim *expressly* made by the ad; it was not derived from expressly truthful statements. And although the court in *American Home Products Corp.* v. *Johnson & Johnson*, 654 F. Supp. 568, 583 (S.D.N.Y. 1987), did find an implied claim without relying on extrinsic evidence, that decision is clearly inconsistent with the Second Circuit's settled rule that courts must require extrinsic evidence in such cases, and probably would not have withstood challenge on appeal. See Preston, *False or Deceptive Advertising Under the Lanham Act: Analysis of Factual Findings and Types of Evidence*, 79 TRADEMARK REP. 508, 528 (1989).

impossible for advertisers to predict whether a particular ad will be interpreted by the Commission as conveying misleading implications. As the *amicus* brief of the American Association of Advertising Agencies, Inc., *et al.*, confirms and as the Seventh Circuit itself recognized (Pet. App. 16a, 27a-28a), advertisers faced with this uncertainty will be discouraged from making truthful factual statements about their products or services for fear that the Commission will perceive some misleading implication in those statements. The threat of discouraging such important information provides a compelling reason why the FTC Act should be interpreted as requiring objective, extrinsic evidence of such claims.[11]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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[11] The Commission insists (Br. 25) that *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), establishes that the First Amendment does not require the use of extrinsic evidence to prove the existence of implied claims. As we noted in the Petition (at page 26), however, *Zauderer* said nothing about whether the *FTC Act* requires such evidence; it was not even an FTC Act case. Moreover, the ad in *Zauderer* was misleading on its face, in contrast to the facially truthful ads involved here. See Pet. 26-27.

